

PRE-TRIAL DETENTION IN ZANZIBAR:

*A Study of Human Rights of Pre-trial Detainees
under domestic law and practices*



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Abbreviations

ACHPR	African Charter on Human and Peoples Rights
AHRLR	African Human Rights Law Reports
CAT	Convention Against Torture
C.C.M.	Chama Cha Mapinduzi
Cap	Chapter of the Law
CPA	Criminal Procedure Act
CUF	Civic United Front
D.P.P.	Director of Public Prosecutions
ECHR	European Commission of Human Rights
FIDH	International Federation for Human Rights
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
J.A.	Justice of Appeal
L.H.R.C	Legal and Human Rights Centre
L.R.T.	Law Reports of Tanzania
NGOs	Non-Governmental Organizations
SMR	Standard Minimum Rules
T.L.R.	Tanzania Law Reports
VCLT	Vienna Convention on the Law of Treaties

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1 PROTECTION OF HUMAN RIGHTS OF PRE-TRIAL DETAINEES IN ZANZIBAR

1.1 General Introduction

This is a study of the protection of human rights of pre-trial detainees under Zanzibar law and practices. In this study, I wish to consider whether problems and conditions associated with the abuses of human rights of the pre-trial detainees in Zanzibar can be solved and improved.

The law in Zanzibar has made a significant progress in the protection of the right to personal liberty and rights of persons deprived of their liberty through Constitutional reform since 1984. The Zanzibar Constitution of 1984 contains the Bill of Rights which guarantees fundamental rights and freedoms of all persons including the pre-trial detainees. However, since the aftermath of the first multiparty election in 1995, there has been continuing problems of abuse of powers by law enforcement officials. For instance, arbitrary deprivation of liberty has become a common practice in Zanzibar, suspects of criminal offences are denied their right to bail, to legal assistance, to communicate with relatives, in some cases pre-trial detainees are subjected to torture and other ill treatments. Thus, there is a gap between what the law provides as rights and the practices of law enforcement officials.

The violations of right to liberty and rights of pre-trial detainees in Zanzibar persist because of various factors including police corruption, lack of awareness of legal rights, disrespect of the law by the law enforcers, political misuse of the law enforcers and absence of an independent and effective system of supervision of police practices. The existence of an independent monitoring system is very important to safeguard rights of pre-trial detainees and also to ensure the law enforcement officials comply with safeguards against unlawful

deprivation of liberty and respect for the rights of pre-trial detainees. Lack of external monitoring body makes individual and unscrupulous police officers to feel quite confident to abuse their power with impunity. Therefore, in order to ensure the law enforcement official comply with the law it is important to intensify internal supervision of police conducts, to establish independent monitoring system of police stations and also to make sure that law enforcers who abuse their powers are brought to justice.

1.1.1 Objective of the study

The objective of this study is to explore the extent to which rights of persons deprived of their liberty are protected under domestic law and practice. This study approaches the deprivation of liberty from the perspective of “Why” and “How”. This means the study will examine legal grounds justifying detention also conditions and treatment of all persons in detention pending trial. The study could be used to raise and improve awareness of the police about the requirement of the international human rights standards and of achieving object of these standards related to pre-trial detention. After the identification of the gaps between the law and practices conclusion(s) and recommendation(s) will be given for improvement of the law and practices.

1.1.2 Research questions.

The following are the research questions that will provide guidance towards the objectives of the study;

1. To what extent domestic law and practices in Zanzibar afford protection of rights of persons deprived of their liberty as provided under various international human rights instruments to which the United Republic of Tanzania is a party?
 - i. What are the grounds justifying pre-trial detention of a person suspected of committing an offence?
 - ii. Who decides on pre-trial detention?
 - iii. Who authorizes release of pre-trial detainees?
 - iv. Does the law provide alternatives to pre-trial detention?
 - v. How long a person deprived of his liberty can be kept under custody before he is brought to a magistrate?

- vi. How does the law protect individuals against unlawful or arbitrary arrest and detention?
- vii. At what point do persons deprived of their liberty have the right to access to a lawyer?
- viii. What are the conditions of detention?
- ix. What remedies guaranteed under domestic law for unlawful deprivation of liberty?
- x. Is there judicial supervision of pre-trial detention?

1.1.3 Scope and limitation.

This study is only concerned with the powers of law enforcers vis a vis the rights of persons deprived of their liberty on suspicion that such person has committed a crime. It will not consider rights of persons convicted of any criminal offence. The following domestic legal instruments will be the used; the Constitution of the United Republic of Tanzania of 1977, the Zanzibar Constitution of 1984, the Zanzibar Criminal Procedure Act, the Zanzibar Penal Act¹, the Zanzibar Evidence Decree², Police Force Ordinance Cap.322³ and the Offenders Education Act⁴. Also the Commission for Human Rights and Good Governance Act⁵, and the Basic Rights and Duties Enforcement Act, 1994.

1.1.4 Research Method

First there will a legal analysis of relevant international and domestic legal provisions governing pre-trial detention. The 1969 Vienna Convention on the Law of Treaties

¹ Act No.6, 2004. this Act repeals the Penal Decree, Chapter 13 of the Laws of Zanzibar (Consolidated Version), Printed and Published by the Government Press, Zanzibar.

² Chapter 5 of the Laws of Zanzibar (Principal Legislation), Printed and Published by the Government Press, Zanzibar.

³ Chapter 322 of the Laws (Revised) (Principal Legislation), Printed and Published by the Government Printer, Dar es Salaam, 1959

⁴ Act No.1, 1980, Legal Supplement (Part II) to the Zanzibar – Tanzania Gazzete, Vol. CII. No. 5620 of 10th July 1993. Printed and Published by the Government Press, Zanzibar.

⁵ Act No.7 of 2001, Act Supplement to the Gazzete of the United Republic of Tanzania, No. 18 Vol.82 of 4th May 2001, Printed by the Government Printer, Dar es Salaam, by Order of Government, ISSN 0856-0331X. Also available at <http://www.parliament.go.tz/Polis/PAMS/Docs/7-2001.pdf>

(VCLT)⁶ will be used as tool to interpret applicable provisions under international human rights law. Article 31 of VCLT states that an international treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”. Thus, interpretation of primary significance is the textual and contextual interpretation. However, article 32 of VCLT provides that “preparatory work of the treaty and the circumstances of its conclusion” may also be used where interpretation of the provision under article 31 “leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable”. For the purpose of this study, case laws, General Comments and Concluding Observations of the Human Rights Committee will be used as authoritative interpretation of the provisions relevant to pre-trial detention. Secondly, after the analysis of international and domestic legal provisions relevant to pre-trial detention this study will examine how they are applied in practice in order to find out the gap between the protection afforded in the law books and their practical implementation. Sources will include analysis of books, and interviews with few selected individuals whom the author felt might have knowledge relevant in this study, and Tanzania newspapers. Other sources include the United Nations documents on Tanzania, reports of human rights practices of domestic and international no-government organizations, the United States reports of human rights practices in Tanzania and other Internet based documented source materials. Since this author has been in the Tanzania Police for the past seven years, he will share his own experience and understanding of this field of study.

⁶ Signed at Vienna 23 May 1969, entry into force: 27 January 1980

1.1.5 The Basic Concepts.

1.1.5.1 Arrest.

This term is defined as “the act of apprehending a person for the alleged commission of an offence or by the act of authority”⁷. The purposes of arrest include preventing the arrested person from committing, or continuing to commit an unlawful act, for the purpose of investigation of the unlawful act of the arrested person, or to present the arrested person before the court for trial. In Zanzibar the most common form of arrest is by the police officials although in certain situations private individuals may arrest according to the circumstances and procedures laid down in the Criminal Procedure Act (hereafter CPA)⁸. Any private individual exercising the power of arrest is required to hand over the arrested person before the police immediately.

1.1.5.2 Pre-trial detention.

In this study the term “pre-trial detention” is used to mean deprivation of personal liberty of a person who is reasonably suspected of committing an offence and temporarily held in police custody or in remand prison while awaiting trial. Under article 9(3) of the ICCPR the general rule for the people awaiting trial is that they should not be detained in custody. In other words, liberty is the rule, to which detention is exception. Where necessary a person may be held in custody for the purpose of effecting the investigation of the alleged offence committed by that person and protection of the society and the victim.

1.1.5.3 Law enforcement official

In this study this term is used to mean “all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention”⁹

⁷ This definition is taken from the United Nations Body of Principles for the Protection of All persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly resolution 43/173 of 9 December 1988.

⁸ Act No.7, 2004, the Act repeals the Criminal Procedure Decree, Chapter 14 of the Laws of Zanzibar (Consolidated Version), Printed and Published by the Government Press, Zanzibar.

⁹ Code of Conduct for Law enforcement officials, adopted by the UN General Assembly resolution 34/169 of 17 December 1979, Article 1(a)

1.1.6 Overview of chapters

This study is divided into six chapters. Chapter one has two parts, an introduction that highlights the basis of the study and general background of Zanzibar with reference to protection of the right to liberty. Chapter two focuses on the analysis of existing international human rights standards that protect rights of pre-trial detainees. Chapter three gives an outline of the domestic law and procedures governing pre-trial detention and also rights of the pre-trial detainees in Zanzibar. Chapter four discusses protection of human rights of pre-trial detainees in practice. This is done in order to demonstrate the challenges that arise in the implementation of human rights of pre-trial detainees at domestic level. These challenges are discussed in chapter five. Chapter six concludes findings of the study and provides some recommendations that aim to improve compliance of the law and practices.

1.2 Zanzibar: General background

Zanzibar is a part of the United Republic of Tanzania¹⁰. The United Republic of Tanzania was created in 1964 between Zanzibar and Mainland Tanzania. Article 1 of the Union Constitution (1977)¹¹ proclaims that “Tanzania is one State and is a Sovereign United Republic” with its territory consisting “the whole of the area of the Mainland Tanzania and the whole area of Tanzania Zanzibar and includes the territorial waters”¹². Within the Union, Zanzibar has its own Constitution¹³ with its executive, the judiciary and the law making bodies (the House of Representatives). The Union Constitution empowers the Government of the United Republic with exclusive “authority with respect to all union matters in the United Republic and over all other matters concerning Mainland

¹⁰ Zanzibar Constitution (1984), article 1

¹¹ Edition of 1998, Printed by the Government Printer, Dar es Salaam-Tanzania.

¹² Article 2 of the Union Constitution

¹³ Edition of 2003, Printed and Published by the Government Press, Zanzibar 2003. This Constitution is considered as “a mere shell, a sterile document with only ceremonial value” because it lacks respect from Dodoma, the capital of the Union Government. See Joseph Oloka-Onyango & Maria Nassali (eds.), *Constitutionalism and political stability in Zanzibar; the search for a new vision*, 2003 p.56

Tanzania¹⁴”. Some of the union matters listed in the ‘Articles of the Union’ include the Constitution of the United Republic of Tanzania (1977), External Affairs, Defence, Police, Citizenship, Immigration, and the Public Service of the United Republic of Tanzania¹⁵. Under article 102 of the Union Constitution, the Revolutionary Government of Zanzibar remains with exclusive powers over non-union matters.

The 1964 Union between Zanzibar and Mainland Tanzania created a new international subject, the United Republic of Tanzania. When Zanzibar ceased to be a sovereign state in international law, powers to ratify treaties and agreements were transferred to the United Republic of Tanzania. Tanzania is party to various international human rights instruments including the International Covenant on Civil and Political Rights (hereafter the ICCPR)¹⁶ and at regional level the African Charter on Human and Peoples Rights (ACHPR)¹⁷. However, the government has not yet ratified the Convention Against Torture (CAT) and Optional Protocols to the ICCPR and ICESCR.

The application of international law within the United Republic requires legislative action in order to be enforced at domestic level. Thus, courts in Tanzania do not directly apply treaties, which affects individual rights and liabilities or which require modification of domestic law or statute for their implementation. However, article 9(f) of the 1977 Constitution provides that all state agencies have the obligation to direct their policies and programmes towards ensuring that human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights (hereafter UDHR)¹⁸. In practice, the courts in Tanzania are guided by the spirit of human rights instruments ratified by the Government and have applied their underlying principles in their decisions¹⁹.

¹⁴ article 34

¹⁵ See Joseph Oloka-Onyango & Maria Nassali (2003) p.41

¹⁶ Adopted by the UN General Assembly resolution 2200/A (XXI) of December 1966

¹⁷ Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3/Rev 5, entered into force 21 October 1986

¹⁸ Adopted by the UN General Assembly resolution 217 A (III) of 10 December 1948

¹⁹ See UN Doc. CCPR/C/SR.1689 of 30 July 1998

1.2.1 The Bill of Rights in the domestic law

The Constitution of the United Republic of Tanzania (1977) in its fifth Constitutional amendment of 1984 entrenched a Bill of Rights, which guarantees fundamental rights and freedoms. The rights and freedoms in the Bill of Rights became enforceable in the court of law officially in 1988. In Zanzibar, the first post-Revolution Constitution of Zanzibar (1979) did not contain the Bill of Rights until 1984 when the new Zanzibar Constitution was enacted by Act No. 5 of 1984. The Bill of Rights in the Zanzibar Constitution became enforceable on the same date as the Constitution came into force. Being one part of the United Republic of Tanzania, Zanzibar is governed by the two Constitutions. Hence, on the issues of basic rights and duties any individual in Zanzibar may invoke any of the provisions of the two Constitutions.

According to the domestic legal systems in Tanzania, enforcement of basic rights and duties under the Bill of Rights in the Union Constitution remains exclusive jurisdiction of the High Court²⁰. The Parliament of the United Republic (National Assembly) enacted the Basic Rights and Duties Enforcement Act No. 33/1994²¹ which provides procedures to be complied with in the enforcement of the Basic Rights and Duties under the Union Constitution. Also article 24(3) of the Zanzibar Constitution confers to the Zanzibar High Court the exclusive jurisdiction to enforce fundamental rights and freedoms. It is argued that to confer the High Court with exclusive jurisdiction to hear all matters in relation to fundamental rights and freedoms denies poor persons their right to have access to justice. This is due to the fact that there are few High Court Centres in the country to meet the needs of potential complainants. To institute the proceedings before the High Court a complainant requires assistance of a lawyer and many victims of abuse are poor persons who are unable to hire a lawyer. Additionally, there is general lack of awareness of legal rights among the public. As a result many victims do not claim their rights before the High Court when violated. Therefore, all these factors taken together amount to denial of rights to justice to the poor.

²⁰ Means the High Court of the United Republic of Tanzania or the High Court of Zanzibar. See interpretation provided in section 2 of the Basic Rights and Duty Enforcement Act.

²¹ Act No. 33 of 1994, Printed by the Government Printer Dar es Salaam-Tanzania

2 INTERNATIONAL STANDARDS APPLICABLE TO PRE-TRIAL DETENTION

2.1 Introduction

This chapter will present an analysis of the basic international legal standards governing pre-trial detention and rights of pre-trial detainees. More emphasis will be laid on the jurisprudence of the Human Rights Committee (hereafter HRC) because the ICCPR provides specific provisions on pre-trial procedures and rights of the pre-trial detainees, also because the courts in Tanzania apply its underlying principles in their decisions²². The ACHPR contain general provisions governing deprivation of liberty in its article 6, nevertheless, it does not provide clearly what are the rights of person arrested or detained and also does not provide for any right to reparation for unlawful deprivation of liberty²³. Further, the African Commission on Human and Peoples' Rights (hereafter the African Commission) in many occasions has found that the right to freedom and security of the individuals under the ACHPR has been violated but it "has not set out any particular reasoned argument"²⁴. The jurisprudence of the European Court will be used where appropriate as it has influenced the normative development of international human rights system and the HRC has frequently referred to judgments of the European Court of Human rights.

2.2 The Right to liberty.

Protection of the right to personal liberty finds its basis in Article 3 of the Universal Declaration of Human Rights which states that; "Everyone has the right to life, liberty and security of person." The Declaration is not legally binding but it has become the genesis for the later international human rights instruments which are binding to states parties such as the ICCPR, the European Convention on Human Rights and the African Charter on Human and Peoples' Rights. The ICCPR is the first United Nations treaty to translate the civil and political rights principles of the UDHR into legally binding rights.

²² See UN Doc. CCPR/C/SR.1689 of 30 July 1998

²³ Fatsah Ouguergouz, *the African Charter on Human and Peoples' Rights; A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, 2003 p. 119

²⁴ *ibid* p. 120

Under the ICCPR, the right to liberty and security is protected in its Article 9(1) which provides that “... No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” Thus, to be lawful, any deprivation of liberty should be effected based on the grounds and procedures found in domestic legislations. The most common legitimate ground for loss of liberty is the existence of reasonable suspicion that a person has committed a criminal offence. However, the reasonableness of suspicion alone does not justify detention of criminal suspect. Where detention is necessary, the international human rights instruments require states parties to guarantee certain rights to persons under detention. These include presumption of innocence, not to be compelled to testify against oneself, respect for human dignity, and freedom from torture and inhuman treatment during the entire period of detention. These safeguards, according to the Human Rights Committee, (hereafter HRC) constitute minimum standards which all states parties have agreed to observe²⁵. This chapter will analyse basic significant safeguards guaranteed under international human rights instruments.

2.2.1 Prohibition of arbitrary arrest or detention.

This principle is found in Article 9(1) of the ICCPR and also in Article 6 of the ACHPR which prohibit subjecting any person to “arbitrary arrest or detention”. These Articles require any deprivation of liberty to conform to the domestic law. The legal basis of arrest and detention in domestic law also relates to the quality of the law itself. It must be compatible with restrictions allowed by article 9(1) which provides safeguard for respect of the right to liberty, and with the rule of law. In its concluding observation on Trinidad and Tobago the HRC stated that “ Police Act which enable any policemen to arrest any person without a warrant in large number of circumstances ... gives too generous an opportunity to the police to exercise this power”. The HRC concluded that such broad discretion did not

²⁵ see *Bernad Lubuto v. Zambia*, Communication no. 390/1990 CCPR/C/55/D 390/1990

guard sufficiently against arbitrariness; hence, recommended that the State party confine its legislation so as to bring it into conformity with article 9(1) of the Covenant²⁶.

The issue of “lawfulness” also requires that the enforcement of the law must not be arbitrary. The grounds for deprivation of liberty adopted by the domestic law may be compatible with the requirements of article 9(1) and the rule of law. However, the act of deprivation by the police may be arbitrarily effected. In the case of *Van Alphen v The Netherlands*, 305/1988 (23 July 1990) the Human Rights Committee stated that “the term ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, and lack of predictability”. This means that the remand in custody in the first place must be lawful, reasonable and necessary in all circumstances, for instance, to prevent flight, interference with evidence or where there is a significant danger of the recurrence of crime. In the case of *Annette Pagnoule (on behalf of Aboulaye Mazou) v. Cameroon* (Communication 39/90)²⁷ the African Commission held that detention without any charge being brought against the suspect constitutes arbitrary deprivation of liberty.

2.2.2 Presumption of innocence.

Every suspect of criminal offence has the right to be presumed innocent, and treated as innocent, until proved guilty according to law in the course of criminal proceedings²⁸. The HRC in its General Comment 13²⁹, paragraph 7 stated that by reason of presumption of innocence all public authorities should not prejudge the outcome of a trial. Thus, prosecutors and police officials should not make statements about the guilt or innocence of an accused before the outcome of the trial. The right to be presumed innocent forms the starting point for all standards protecting the rights of the pre-trial detainees. It distinguishes the pre-trial detainees with convicted persons. Most of the standards and practices for the treatment of pre-trial detainees are found in rules 84 to 92 of the United

²⁶ Joseph, Schultz and Castan, p.309

²⁷ quoted from Fatsah Ouguergouz, p. 120

²⁸ UDHR, Article 11; the ICCPR, Article 14(2); ACHPR, Article 7(1)(b) and Paragraph 2(D) of the African Commission Resolution, ACHPR/Res. 4(XI) 92

²⁹ UN Doc. CCPR/C/21/Rev.1 (twenty-first session, 1984)

Nations Standard Minimum Rules for Treatment of Prisoners (SMR)³⁰. In the case of *A.W. Mukong v. Cameroon* the HRC stated that the norms found in the SMR are incorporated into article 10 guarantee³¹ and States parties have obligation to implement them³².

2.2.3 Notification of reasons for arrest.

Article 9(2) of the Covenant requires that “anyone who is arrested shall be informed at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him”. According to this article there is a two-stage notification process. First, at the time of arrest a person must be reasonably made aware of the precise reason for his arrest. Second, soon after the person has been arrested, he or she must be informed of the charges brought against him or her. In the case of *Hill and Hill v. Spain (526/93)* the HRC found no violation of article 9(2) of the Covenant. In this case the authors alleged that seven and eight hours respectively elapsed before they were informed of the reason for their arrest and also complained that they did not understand the charges for lack of a competent interpreter. However, the HRC concluded that the police formalities were suspended for three hours until the interpreter arrived so that the accused could be duly informed in the presence of legal counsel³³. The African Commission in the case of *Huri-Law (on behalf of the Civil Liberties Organization) v. Nigeria* held that failure or negligence to comply with the requirement to inform the arrested person promptly of any charges against him violates the right to a fair trial guaranteed by the ACHPR³⁴.

2.2.4 Right to be brought promptly before a judge.

Article 9(3) of the ICCPR requires any person “arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power”. This right ensures judicial control over detention of the person charged with criminal offence and also enables the court to determine whether legal reasons exist

³⁰ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the UN Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977

³¹ Communication No. 458/ 1991 in UN Doc. GAOR, A/49/40

³² Concluding observation on the United States of America, UN Doc. CCPR/C/79/Add. 50

³³ UN Doc. GAOR, A/36/40 pp.128-129 paras 12 -13

³⁴ Communication No. 225/98 (available at <http://www1.umn.edu/humanrts/africa/comcases/225-98.html>)

for one's loss of liberty. The HRC stated that "states parties should take action to ensure that detention in police custody never last longer than 48 hours and that detainees have access to lawyers from the moment of their detention"³⁵. The requirement of 'promptness' is determined on case-by-case basis; nevertheless, the delay between the arrest of an accused and the time before he or she is brought before a judicial authority "should not exceed a few days"³⁶. In the case of *M. Freemantle v. Jamaica* the HRC held that "in the absence of a justification for a delay of four days before bringing the author to a judicial authority the notion of promptness in article 9(3) is violated"³⁷. The issue of 'who' qualify as an officer authorized to exercise judicial power was considered in the case of *Kulomin v. Hungary* (521/1992). In this case, after arrest the author's pre-trial detention had been extended several times by the public prosecutor. The HRC stated that "... it is inherent to the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with"³⁸. The HRC was not satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered as 'officer authorized by law to exercise judicial power' within the meaning of article 9(3) of the Covenant.

2.2.5 The right to trial within a reasonable time or release pending trial.

International standards require that any person charged with a criminal offence and held in pre-trial detention should be tried within a reasonable time or be release from detention³⁹. This principle guarantees protection in view of the fact that suspects of criminal offences are presumed innocent until proved guilty by the court. In the case of *Girjadat and Others v. Trinidad and Tobago* (938/2000) the HRC stated that "what period constitutes 'reasonable time' within the meaning of article 9 paragraph 3, must be assessed on a case-by case basis. A delay of three years during which the authors were kept in custody cannot

³⁵ Concluding Observation (2000), UN Doc. CCPR/CO/70/GAB

³⁶ General Comment 8, UN Doc. CCPR/C/21/Rev.1 (sixteenth session, 1982) paragraph 2

³⁷ UN Doc. GAOR, A/51/40 (Vol. II) p.19 para 7:4

³⁸ See UN Doc. GAOR, A/51/40 (Vol. II)

³⁹ see ICCPR, article 9(3); ACHPR, Article 7(1)(d) and Paragraph 2(C) of the African Commission Resolution

be deemed compatible with article 9 paragraph 3⁴⁰ of the ICCPR. In the case of *Paguouille (on behalf of Mazou) v. Cameroon* (2000) AHRLR 5 (ACHPR 1997) The African Commission held that delay to give judgment for over two years without giving the applicant any reason for such delay constitutes violation of Article 7(1)(d) of the ACHPR which protects “the right to be tried within a reasonable time by an impartial court or tribunal”⁴¹. With regard to ‘release pending trial’ under article 9(3) the HRC has consistently held that “pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party”⁴².

2.2.6 Access to legal counsel.

The right to legal counsel is guaranteed in article 14(3)(d) of the ICCPR and also in article 7(1)(c) of the ACHPR in connection with the right to a fair trial. In practice, it is an important means of ensuring that the rights of pre-trial detainees are respected. In its concluding observation on Georgia, the HRC provides that “all persons arrested must have immediate access to counsel”⁴³. In the case of *Avocats Sans Frontieres (on behalf of Bwampamye) v. Burundi* (2000) AHRLR 48 (ACHPR 2000)⁴⁴, the African Commission found violation of article 7(1)(c) when the Criminal Chamber of the Ngozi Appeal Court sentenced Mr. Bwampamye to death without considering his prayer for adjournment of the case because of the absence of his lawyer. The Commission held that;

“By refusing to accede to the request for adjournment, the Court of Appeal violated the right to equal treatment, one of the fundamental principles of the right to fair trial ... considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case”⁴⁵

⁴⁰ CCPR/C/81/D/938/2000 (Jurisprudence) paragraph 6.1

⁴¹ Quoted from the Compendium of Key Human Rights Documents of the African Union (the Compendium) Pretoria University Law Press, 2005 ISBN 0-620-34672-8, p.122 para 19. Available at www.chr.up.ac.za/pulp visited 11.03.2006

⁴² Hill and Hill v. Spain Communication No. 526/1993 UN Doc. GAOR, A/52/40

⁴³ see UN Doc. CCPR/C/79/Add.74 9 April 1997 para 28

⁴⁴ see the Compendium pp.120-121

⁴⁵ ibid paras 29, 30 and 32

In the case of *Ocalan v. Turkey*⁴⁶ the European Court of Human Rights found that the applicant's trial was unfair because he had no assistance from his lawyer during questioning in police custody and was unable to communicate with his lawyer out of the hearing of third parties. In addition, the applicant was unable to gain direct access to the case file until very late stage in the proceedings, restrictions were imposed on the number and length of his lawyers' visits, and his lawyer were not given proper access to the case file until late in the day. The Court found that "the overall effect of those difficulties taken together as a whole had so restricted the rights of the defence", thus, contravene the principle of a fair trial. The Court held that there was a violation of article 6(1) taken together with article 6(3)(b) and (c) of the European Convention.

2.2.7 Freedom from torture.

The international human rights instruments require that no suspect of criminal offence should be subjected to torture, cruel, inhuman or degrading treatment or punishment⁴⁷. The right to freedom from torture prohibits law enforcement officials from inflicting, instigating or tolerating torture or other inhuman or degrading treatment or punishment of persons deprived of their liberty. The law enforcing officers are bound by international standards to disobey order justifying torture from their superior officers⁴⁸. The HRC in its General Comment No. 20⁴⁹ paragraph 3 provides that "... no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reason, including those based on order from a superior officer or public authority". The prohibition against torture is a norm of *jus cogens* or a 'peremptory norm' of general international law accepted and recognized by the international community of States⁵⁰. The scope of prohibition against torture is extensively expanded in the United Nations Convention

⁴⁶ see Application No. 46221/99 [2005] ECHR 282 (12 May 2005) para 149

⁴⁷ See the UDHR, Article 5, the ICCPR, article 7, and the ACHPR, article 5.

⁴⁸ See CAT, Article 2(3) and the Code of Conduct for Law Enforcement Officers, adopted by the UN General Assembly Resolution 34/169 of 17 December 1979, Articles 5 and 8

⁴⁹ see UN Doc. CCPR/C/21/Rev.1/Add.3 and A/47/40, annex VI (forty-fourth session, 1992)

⁵⁰ see VCLT, Article 53

Against Torture (CAT)⁵¹, which deals in more details with the implications of the prohibition of torture and cruel, inhuman, or degrading treatment or punishment.

2.2.7.1 Definition of torture.

Article 1 of the CAT provides a definition of torture that is a widely accepted definition due to the universal status of the CAT. The term ‘torture’ has been defined as;

“... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the investigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanction”

It is most likely that suspects in custody may be subjected to torture so as to compel them to confess on the charges against them. This danger is predictable due to the fact that suspects are held in situations where public scrutiny in relation to their treatment does not exist. The Committee Against Torture in its concluding observations on Saudi Arabia stated that “... prolonged pre-trial detention ... beyond the statutory limits prescribed by law, which heightens the risk of, and may on occasion of itself constitute, conduct in violation of the Convention. ... the Committee is concerned at the limited degree of judicial supervision of pre-trial detention”⁵². This presupposes that one way of reducing the risk of torture in custody is to have all pre-trial detention facilities supervised regularly by the judicial officers. Despite lack of definition of torture in the ICCPR, the HRC in numerous cases has found various combinations of acts that in its view constitute torture or cruel, inhuman or degrading treatment within the meaning of articles 7 and 10 of the Covenant. For instance, in the *Girjadat and Others v Trinidad and Tobago* (938/200), the applicants were held in solitary confinement in a cell measuring 9 by 6 feet, no sanitary facilities, they used plastic pail as toilet, and their cell had scarce ventilation and light. In this case the HRC found violation of applicants’ right to be treated with humanity and with respect for

⁵¹ Adopted by the UN General Assembly resolution 39/46 of 10 December 1984.

⁵² UN Doc. CAT/C/CR/28/5 (12 June 2002) para 4(d)

the inherent dignity of the human person protected in articles 7 and 10 of the ICCPR. In the case of *Ouko v. Kenya* (2000) AHRLR 135 (ACHPR 2000)⁵³, the African Commission found violation of Article 5 of the ACHPR that protects the right to respect of the dignity inherent in human being and freedom from inhuman and degrading treatment. In this case the applicant was held in detention facility that had a 250-watt electric bulb that was left on throughout his ten months detention, he was denied bathroom facility and was subjected to physical and mental torture⁵⁴. However the African Commission did not find violation of the right to freedom from torture because the complainant could not substantiate his claim that he was subjected to torture during his detention⁵⁵. Nigel Rodley (1999:77) has observed that most of the elements of the definition of ‘torture’ are found in the European Commission of Human Rights (ECHR) report in the *Greek case 504 (1969)*. The ECHR indicated its view that ‘torture’ comprises ‘inhuman and degrading treatment’ and ‘inhuman treatment comprises degrading treatment’. The Committee described the notion of ‘inhuman treatment’ as a treatment deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable. Treatment or punishment is ‘degrading’ if it grossly humiliates the person affected before others. Further, ‘torture’ as ‘inhuman treatment’ has a purpose, such as obtaining of information or confessions, or the infliction of punishment, and is generally an aggravated form of inhuman treatment⁵⁶.

2.2.8 The right to challenge legality of deprivation of liberty.

Article 9(4) of the Covenant entitles any person to challenge the lawfulness of his loss of personal liberty before the court in the nature of ‘habeas corpus’. This right is essential for the maintenance of the rule of law in a view that its exercise ensures legal control over the public officials who violate the rights to personal liberty and security of persons. Thus, it holds those officials liable to sanctions for the abuse of rights of the individuals. The right to ‘habeas corpus’ is exercised by the persons in custody as a direct challenge to the lawfulness of their detention. According to the HRC, the right guaranteed by article 9(4) is

⁵³ see the Compendium pp. 132-133

⁵⁴ *ibid* paras 22 and 23

⁵⁵ *ibid* para 26

⁵⁶ Nigel Rodley, p.77

violated if the author himself or his legal representative shows evidence that he did requested a decision of the court on the lawfulness of his detention⁵⁷. This article requires that the court before which the case is filed must have the power to order release of the person in custody if the detention does not meet the requirements of 9(1) of the Covenant. Additionally, article 9(5) of the Covenant entitles any “victim of unlawful arrest or detention ... an enforceable right to compensation”. States parties have obligation to take effective measures to remedy the violations suffered by the victim of unlawful deprivation of liberty and to grant him compensation under article 9(5) of the Covenant.

2.3 Conclusion

This chapter has presented basic international legal standards which protect the rights of persons deprived of their liberty. These standards put emphasis on the principle of legality on any matter relating to deprivation of individual liberty. This principle requires that all decisions on pre-trial detention be taken only by an authority that satisfies the requirements of the rule of law, which emphasizes “absolute supremacy or predominance of regular law ... as opposed to the influence of arbitrary power”⁵⁸. The rule of law also requires all activities of the state and society to be subject to the Constitution of the state “which make it possible to foresee with fair certainty how the authority will use its coercive powers in a given circumstances”⁵⁹. States sign international human rights treaties in order to promote and defend human rights of all the people within their territories. When provisions of these treaties become part of national law, police are employed to enforce. Therefore, the police officers are in the front line to protect and defend fundamental rights of everyone in the society, including those deprived of their liberty. Adherence to these standards by the police ensures respect for the right to liberty and security of a person. Effective guarantee of individual liberty and security promote internal security of the state which is important for enjoyment of all human rights under international human rights instruments.

⁵⁷ Stephen v. Jamaica, 373/89

⁵⁸ Ada O. Okoye, *the Rule of Law and Sociopolitical Dynamics in Africa*, in Paul Tiyambe and Philip J McConaughay (eds), *the Human Rights, the Rule of Law, and Development in Africa 2004* p.71

⁵⁹ Ibid p. 73

3 THE RIGHTS OF PRE-TRIAL DETAINEES UNDER DOMESTIC LAW

3.1 Introduction.

The right to personal liberty and security is guaranteed in article 15(1) of the Union Constitution and in article 14(1) of the Zanzibar Constitution. These provisions protect individual from unlawful deprivation of liberty. Thus, the law acknowledges that under certain situations deprivation of one's liberty before trial may be justified in order to maintain public safety. In addition, the domestic law recognises right of suspects of criminal offences to have their rights protected from the moment they are deprived of their liberty. Therefore, a number of significant safeguards have been incorporated into domestic legal systems. The law requires law enforcement officials to respect these rights and to treat the suspects with respect for their status as innocent persons.

3.2 Basic rights and safeguards under domestic law

The following are some of the basic rights and safeguards which form an integral part of the criminal justice system in relation to right to personal liberty and pre-trial procedures in Zanzibar.

3.2.1 Prohibition of unlawful arrest and detention.

Articles 15(2)(a) of the Union Constitution and 14(2)(a) of the Zanzibar Constitution provides that "... no person shall be arrested ... confined, detained or otherwise deprived of his freedom save only under circumstances and in accordance with procedures prescribed by law". This means both Constitutions upheld the principle of legality in relation to any deprivation of liberty in the administration of criminal proceedings. The principle of legality is "violated if an individual is arrested or detained on grounds which are not clearly established in domestic legislation; in other words, the grounds for arrest and detention

must be established by law⁶⁰. For this purpose sections 21(a – j) and 22 (a-c) of the CPA formulate legal grounds justifying arrest and pre-trial detention. For instance, section 21 (a) requires existence of “reasonable suspicion” before a person is arrested or detained for criminal charge. Also section 29 imposes a legal duty to any police officer in charge of police station to report cases of all persons arrested without warrant to the nearest magistrate and to explain whether such persons have been admitted to bail or not.

3.2.2 Presumption of innocence

The right to be presumed innocent is very important in the protection of human rights of the pre-trial detainees because it entitles suspects to be treated as innocent during the entire period of investigation of the alleged offence against them. This right is guaranteed in article 13(6)(b) of the Union Constitution and in article 12(6)(c) of the Zanzibar Constitution which states that “no person charged with a criminal offence shall be treated as guilty of the offence until proved guilty of that offence”. In the case of *John Nyamhanga Bisare v. The Republic* before the Tanzania Court of Appeal, the presiding judge held that “it seems to us well established on the authorities that the onus and the burden of proof as in all criminal prosecutions lies on the prosecution to establish their case beyond reasonable doubt”⁶¹ It is the police and the prosecutor who have to gather relevant evidence to prove the suspect’s guilt before the court of law. One example of violation of the right to be presumed innocent is when the public authority makes a public statement that declares the suspect as guilty of the alleged offence. In this respect, the HRC in its General Comment No. 13 paragraph 7 has stated that it is “a duty for all public authorities to refrain from prejudging the outcome of the trial”. This means only the courts of law enjoy the power to decide guilty status of the suspect after examination of all relevant evidence brought by the prosecution. If the evidence are insufficient and raise doubt, this situation will benefit the suspects who are under no obligation to prove the case against themselves.

⁶⁰ HRC, *Communication No. 702/1996, C. McLawrence v. Jamaica*, in UN Doc. GAOR, A/52/40 para 5.5

⁶¹ Criminal Appeal No. 29/1990. Tanzania Law Report (TLR) (1980)

3.2.3 The Right to be informed of the full particulars of the offence.

The CPA in its section 30(1)(b) requires any police officer effecting arrest to communicate to the person arrested full particulars of the offence for which he or she is arrested. This right enables the suspect to challenge the police officer's reasonable suspicion against him before the court and also provides opportunity for preparation of defence.

3.2.4 The right to legal counsel.

It is well established that the right to legal counsel is the single most important effective safeguard against abuse of human rights of pre-trial detainees because of the fact that while in detention they are also under police investigation. The risk of being subjected to inhuman treatment is predictable if they are left alone with police investigators during interrogation. The suspect of criminal offence may need the advice of a legal counsel in relation to the substance of the charge against him, the desirability of exercising the right to remain silent subject to section 30(2) of the CPA during police interrogation or the conditions and length of detention. In the case of *Khassim Hamis Manywele v. Republic (1990)*⁶² the Tanzania Court of Appeal held that the right to legal counsel is a Constitutional right incorporated in the right to a fair trial under article 13(6)(a) of the Union Constitution and that this right extends to all poor suspects accused of all offences which might attract a sentence of over five years imprisonment. This right is also guaranteed in article 12(a) of the Zanzibar Constitution. Section 30(3) of the CPA entitles the pre-trial detainees to have legal counsel present during police interrogation in order to ensure that the suspect is not compelled by the investigating police officer to testify against himself. Additionally, due to technicality of criminal law, the interest of suspect can be effectively protected if he receives the advice of a lawyer.

3.2.5 The right to bail pending trial.

Section 30(4) of the CPA provides suspects of criminal offence with the right to release from custody and requires any police officer to assist the suspect for sureties⁶³ on his or her

⁶² Dodoma High Court, Criminal Appeal No. 39/1990 (unreported)

⁶³ Garner B. A, Black Law Dictionary (8th Edition) 2004 pp. 1482 define "surety" as "a person who is primarily liable for the payment of another's debt or the performance of another's obligation"

behalf. The suspect released on bail is not set free completely but he is released from the custody of the law enforcing agents and entrusted to the custody of his sureties who are bound to produce him on the specified time and place to answer the charge against him. Failure to do so the sureties are liable to forfeit to the government the bond they have signed. Bail pending trial is granted to enable the accused person to attend his trial without being remanded in custody. By granting bail the court ensures that the freedom of the accused person who is presumed innocent is not unnecessarily curtailed. The sureties who sign a bond take the responsibility of making sure that the accused does not leave the jurisdiction of the court on the pain of forfeiting their bond, in case they fail to do so. Bail pending trial is also an important means of reducing population in prisons and the cost of accommodating and feeding remand prisoners. In the case of *Said Gurhl Shabel and Three Others v Republic* (1976) LRT No. 4, Makame, J. (as he then was) stated that;

“the liberty of the individual must be guarded, protected and promoted but the interests of the society, of which the individual is component must be taken into account if society is to move forward and flourish instead of stagnating and breaking apart”.

Therefore, bail is also used to strike a balance between individual liberty and the rights of the society to be safeguarded by making sure that all the accused persons brought before the court are dealt with according to the law.

3.2.6 Appearance before a judicial authority without undue delay.

This rule is expressed in section 25 of the CPA which requires any police officer making an arrest without a warrant to bring the arrested person before a magistrate without delay. Section 28 limits detention period in police custody not to exceed twenty-four hours unless the extension is granted by a magistrate. This means without an order from the magistrate police officers are obliged to send the suspect of criminal offence before the court within twenty four hours. When an application for extension is made to the magistrate, he or she may consider the following before granting extension;

- (a) the person is lawfully detained

(b) the investigation is being carried out as expeditious as possible

(c) that it would be proper in all circumstances to extend the relevant period.

If the magistrate is satisfied he or she may extend for further period as he or she deem reasonable. A person under custodial investigation may petition for damages or compensation against frivolous or vexatious extension of the basic period⁶⁴. This requirement impose a duty to the police officer to ensure that the manner in which investigation is carried out must not be a cause of any failure for the trial to take place without undue delay. The right to be tried without undue delay is a logical protection in view both of the fact that everyone charged with a crime has the right to be presumed innocent until proved guilty by the court and of the fact that deprivation of liberty must be an exceptional measure in criminal proceedings.

3.2.7 Health care of detainees.

The Offenders Education Act contains provisions related to securing the health and physical well being of all persons deprived of their liberty. Section 14 provides for appointment of a medical officer responsible for every detention center. The medical officer has the general care of detainees and of the general sanitary condition of the detention center. Every detainee is medically examined on admission and prior to discharge. Sick register is maintained to keep particulars of all cases under treatment and comments of the medical officer. With regards to health of persons detained in police custody, the CPA requires police officers to assist detainees where a request is made or where it appears to the officer that condition of that person requires medical assistance⁶⁵.

3.2.8 Freedom from torture.

Torture has been outlawed by the Zanzibar Constitution in its Article 13 that prohibits subjecting any person under custody to torture or inhuman or degrading punishment or treatment⁶⁶. In addition article 24(1) of Constitution states that restrictions on the enjoyment of human rights and freedom set out in the Constitution shall not “interfere with

⁶⁴ section 34(2) CPA

⁶⁵ section 35(b) of CPA

⁶⁶ See also Art. 13 (6)(b) of the Constitution of the Union Republic of Tanzania

the right to freedom from torture, inhuman and degrading treatment and ... with human rights principles”⁶⁷. The suspects in the police custody may be subjected to oppressive measures like torture to compel them confess or reveal the whereabouts of evidences or implicate others. Hence, application of such measures to compel the suspects is also prohibited in section 35(2) of the CPA, which provides that “No person shall, while under restraint, be subjected to cruel, inhuman or degrading treatment”. The prohibition from torture on the other hand requires the police to treat the suspects in their custody with “humanity and with respect for human dignity” as provided in section 35(1) of the CPA. In addition, the Zanzibar Evidence Decree in its section 26 provides that “[no] confession made by any person whilst in the custody of a police officer, unless it be made in the immediate presence of a magistrate, shall be proved as against such person”. Thus, the law requires that confession to be proved against any person must be obtained in the manner that does not undermine the person’s freedom to determine and exercise his or her free will.

3.2.9 The right to challenge the legality of detention and remedies.

It is argued that threshold of all preventive safeguards stands the right to challenge legality of detention before the High Court in the nature of “*habeas corpus*”. This safeguard is provided in section 388(b) of the CPA whereby an individual in custody can apply for a writ of habeas corpus for illegal or improper detention. This right is exercised by individual in custody or someone acting on his or her behalf as a direct challenge to the legitimacy of their detention. The High Court is empowered to direct the person in custody to be brought up before it in order to be dealt with according to law or may direct that person to be set at liberty. The Court may order any police officer involved in the institution of the charge to compensate the accused if it is of the opinion that the charge was frivolous or vexatious. The law also provides criminal sanctions for unlawful deprivation of liberty and any police officer may be convicted for wrongful confinement contrary to section 260 of the Zanzibar Penal Act⁶⁸ or for abuse of office contrary to section 81 of the same Act.

⁶⁷ as per the 2002 amendment of Article 24 of the Zanzibar Constitution, 1984.

⁶⁸ Act No 6 of 2004. This Act repeals the Penal Decree, Chapter 13 of the Law of Zanzibar.

Compensation for the infringement of the constitutional rights to liberty is sanctioned under article 24(2) of the Zanzibar Constitution and article 30(3) of the Constitution of the United Republic of Tanzania which states that;

“Any person alleging that any provision in this Chapter or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in the United Republic, may institute proceedings for redress in the High Court.”

The Basic Rights and Duties Enforcement Act lays down powers of the High Court in relation to the hearing of the proceedings before it and also it regulates procedures for instituting the proceedings. For instance, section 4 of this Act provides that any person alleging his rights guaranteed in any of the provisions of sections 12 to 29 of the Constitution of the United Republic has been or is likely to be violated may apply redress before the High Court. However, the right to “compensation for the infringement of the Constitutional right to liberty ... has yet to be tested in courts”⁶⁹. This may be a result of many obstacles like high level of ignorance about the availability of the procedure and how one goes about invoking it. Also lack of access to legal expert that could assist in the formulation and submission of a complaint before the High Court.

3.2.10 Complaint Mechanisms.

Apart from the right to habeas corpus domestic law provides two complaint mechanisms whereby by any persons aggrieved by unlawful conducts of any police officer may invoke either of the mechanisms when he or she believes that a police officer has committed a disciplinary or criminal offence.

3.2.10.1 Police complaint mechanism.

The Tanzania Police Force Ordinance, Cap.322 in its section 47 provides list of offences against discipline in the police force. Such offences include discreditable conduct, disobedience to orders, neglect of duty, corrupt practices and ill treatment of any person in custody. Breach of any of the offence listed in section 47 may provide a ground for a

⁶⁹ James L. Mwalusanya, *the Protection of Human Rights in the Criminal Justice Proceedings-Tanzania Experience*, in M. Cherif Bassiouni & Ziyad Maotala, *the Protection of Human Rights in African Criminal Proceedings*, Kluwer Academic Publishers (1995) p.302

complaint against any police officer and criminal or disciplinary proceedings may be taken against such police officer. When the charge under section 47 is proved to be as alleged, the accused may face disciplinary action such as admonishment, fine, stoppage of increment, reduction to lower rate of pay and dismissal. The subject matter of the complaint may also form the basis of a criminal prosecution before a magistrate against the police officer concerned⁷⁰. When the case is brought before a magistrate and the police officer is found guilty, the court may order such police officer to pay the complainant a reasonable sum as compensation for a frivolous and vexatious charge and also for the trouble and expenses that such person may have been put in addition to his cost⁷¹.

3.2.10.2 Complaint before the Commission of Human Rights and Good Governance.

The establishment of Commission of Human Rights and Good Governance in Tanzania was seen as a positive measure that will contribute to the respect, protection and promotion of human rights and help in the realization of good governance. The jurisdiction of the Commission extends both to Mainland Tanzania and Tanzania Zanzibar⁷². The Commission was created as an independent institution that, among other things, receives and investigates complaints on human rights violations and institute proceedings (public hearings) designed to terminate activities involving violations of human rights, or redress the right or rights involved. It may also inquire into complaints related to practices or actions by persons holding public offices and authorities, including private institutions and private individuals where those complaints allege abuse of power, injustice, unfair treatment or any person in the exercise of his official duties. The Commission visits prison and place of detention with a view to inspect conditions of persons held in such places and make recommendations to redress the existing problems.

⁷⁰ section 49 of Police Force Ordinance

⁷¹ section 327 of the CPA

⁷² section 3 of the Act, No. 7 2001

The investigation of any human rights abuse by the Commission may be carried out on Commission's own initiative⁷³ or on receipt of a complaint⁷⁴ from an aggrieved person⁷⁵ such as a person in custody or a patient in a hospital⁷⁶; association acting in the interests of its member⁷⁷; and from a person acting in the interest of group or class of persons⁷⁸. Where it appears to the Commission that an act or omission under investigation amounts to a breach of any of the fundamental rights and freedoms provided in the Constitution of the United Republic of Tanzania or in any international human rights instrument to which the United Republic is a party, the Commission may recommend measures to the relevant person or authority or may require that authority to provide an effective remedy or redress. The Commission has no power to investigate or institute any proceedings against the President of the United Republic or the President of Zanzibar⁷⁹. Despite the fact that the Commission has jurisdiction to function within the territories of the United Republic of Tanzania, the Zanzibar government has not allowed it to carry its activities in Zanzibar. That means there is no independent mechanisms in Zanzibar, which ensure law-enforcing officials comply with safeguards against abuse of pre-trial detainees.

3.3 Conclusion.

This chapter has outlined the most basic safeguards protecting the right to personal liberty and rights of the pre-trial detainees under domestic legal system. The domestic law entitles individuals with the right to liberty, to have their rights protected by law and to be treated with respect for their rights from the moment they are arrested or detained on criminal charges. To have these safeguards in place as matter of law is not enough, they must be respected in practice by the law enforcing agents. Respect of these safeguards contributes to the highest standards of professional conduct on the part of the law enforcers and also serves to institutionalise human rights culture and rule of law.

⁷³ section 15 (a) of the Act, No. 7/2001

⁷⁴ section 15 (b) of the Act, No. 7/2001

⁷⁵ section 15 (b) (i) of the Act, No.7/2001

⁷⁶ section 22 of the Act, No. 7/2201

⁷⁷ section 15 (b) (ii) of the Act, No. 7/2001

⁷⁸ section 15 (b) (iii) of the Act, No. 7/2001

⁷⁹ section 16 of the Act, No. 7/2001

4 PRE-TRIAL DETENTION IN ZANZIBAR AS IMPLEMENTED IN PRACTICE.

4.1 Introduction

In the previous chapters, this study has looked upon the basic safeguards afforded to persons deprived of their liberty both under international and domestic laws. The law requires any deprivation of liberty to be effected according to legal procedures. Therefore, law enforcement officials must respect rights of all persons arrested or detained in their custody on suspicion of being involved in any criminal offence. This chapter will examine some of the basic safeguards protecting the right to personal liberty and rights of pre-trial detainees as implemented in practice in order to find out whether practices of law enforcers conform to the requirements of the law.

4.2 Examination of compliance of the law and practices

4.2.1 Requirement of legality for any deprivation of liberty.

The international human rights law requires that an individual should be arrested or detained according to the procedures established by law⁸⁰. States parties are obliged to establish within their jurisdictions, legal grounds justifying arrest and detention. The grounds must conform to the domestic law and also must be compatible with restrictions allowed by the relevant provisions in the treaties. At domestic level, both Constitutions⁸¹ recognize the requirement of legal procedures for any deprivation of liberty of the individuals⁸². The Criminal Procedure Act (hereafter CPA) in its sections 21 and 22 lays down grounds regarding the circumstances, manner and extent to which police officers may effect arrest or detention of persons suspected of criminal offence. Nevertheless, qualities of some of the grounds justifying deprivation of liberty in those sections do not meet the requirements of the international human rights standards.

⁸⁰ See ICCPR, article 9(1) and ACHPR, article 6

⁸¹ the 1977 Union Constitution and the Zanzibar Constitution 1984

⁸² refer chapter three para 3.2.1

First, the CPA grants any police officer too wide power to arrest any person without a warrant in large number of circumstances that include arrest of any person found “in a high way during night” or any person “who has no ostensible means of subsistence”⁸³. Second, although section 21 requires existence of “reasonable suspicion, reasonable complaint or credible information” against the suspect, nevertheless, the law provides no guidelines on how to define what constitutes “reasonable suspicion” or “credible information”. This means the law leaves substantial discretion powers to any police officer to decide what is reasonable and credible. Given the fact that majority of police officers in Zanzibar lack proper qualifications, skills, training and morale to effectively discharge their duties, such a wide power and under such vague formulation of grounds justifying arrest and detention the right to personal liberty is in very serious risk in the hands of the police as will be illustrated in this chapter.

The law requires existence of ‘reasonable suspicion’ or ‘credible information’ before any deprivation of liberty is effected. Upon receipt of any information of criminal offence the investigating officer has duty to carry out investigative process in order to verify the information received before the suspect is arrested. If the outcomes of the investigation link the suspect with the alleged offence then the suspect will be arrested and detained if necessary. In practice, the police first arrests the suspect and the investigation comes afterwards when the suspect is already in police custody. For instance, following the spate of bomb blasts in Zanzibar in March 2004, police arrested and detained about 45 persons alleged to be members of the Civic United Front (hereafter the CUF) and of religious NGO, UAMSHO⁸⁴. The Deputy Minister of Home Affairs confirmed arrest of 39 suspects following the incident⁸⁵. Some members of the public complained about indiscriminate arrests of innocent people by the police following the incident. However, the Zanzibar Urban West Regional Police Commander where the said blasts took place defended acts of the police that they were hunting for criminals and after investigation those found guilty

⁸³ The CPA, section 22(b)

⁸⁴ The United States Department of State, Tanzania Country Report on Human Rights Practices for 2004 available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41630.htm> visited on 1.10.2005 .

⁸⁵ Mwinyi Sadallah, Zanzibar Correspondent Globalfrontiers, “*INDISCRIMINATE ARRESTS WORRIES ISLES*”, available at http://home.globalfrontiers.com/zanzibar/2004_news.htm (27-03-2004, 08:10:31)

will be sent to court⁸⁶. In fact, police have no power to determine whether the suspect is guilty or not. The duty of the police is to collect relevant evidence that will enable the court to determine whether the suspect has committed the alleged offence or not. From the above event, it seems police strategy in dealing with crimes and violence associated with politics in Zanzibar is to arrest as many people as possible, hold them in custody for interrogation and if no clues that link suspects with the offence the persons arrested may be released without charge or in some cases charged with vagrancy⁸⁷. Such deprivation of liberty is unlawful because it is effected contrary to Article 15(2) of the Union Constitution and Article 14(2)(a) of the Zanzibar Constitution which prohibit arbitrary deprivation of liberty. It should be remembered that deprivation of liberty is lawful when it is justified and carried out according to the grounds and procedures established by law. Lawful deprivation not only requires existence of legal grounds but also the process of deprivation should be in accordance with the procedures of the law⁸⁸. Failure to observe this requirement such deprivation become arbitrary and violates the principle of legality recognised by the two Constitutions as well as the prohibition of arbitrary arrest and detention found in the Article 9 (2) of the ICCPR and Article 6 of the ACHPR.

4.2.2 Presentation of the suspect before a magistrate without delay.

Anyone arrested or detained on criminal charges must be sent to a judge who will determine whether detention pending trial should continue or release the suspect⁸⁹. Presentation before the judge enable the court to review and assess whether sufficient legal grounds for arrest exist, whether detention before trial is necessary, also to safeguard the well being of the suspect as well as to prevent the detainee's rights. Section 25 of the CPA requires the police to send any person arrested on criminal offence before a magistrate

⁸⁶ Ibid

⁸⁷ For instance, arrest of prominent Civic United Front (CUF) members on Zanzibar in mid-May 2000 including medical doctor Juma Amir Muchi, a former CUF parliamentary candidate, Seif Nassor Maalim, a former member of the Union parliament, and Ali Juma, a CUF official. They were held in police custody for longer than 24 hours then released on bail after being charged with "vagrancy". See Amnesty International report, AI Index: AFR 56/009/2000 26 May 2000, available at <http://web.amnesty.org/library/index/engaf560092000> visited 10.11.2005

⁸⁸ see chapter three para 2. 1

⁸⁹ See the ICCPR, art. 9(3) and the African Commission Resolution on the Right to Recourse and Fair Trial, Doc. ACHPR/Res.4 (XI) 92 para 2(c)

without unnecessary delay. Section 28 prohibits any police officers from keeping under custody any suspect arrested without warrant for a period that exceed twenty-four hours. When read together the two sections impose positive duty to any police officer arresting any person on criminal charges to send such person to the magistrate within twenty-four hours from the time of arrest. Keeping the suspect more than twenty-four hours without special order from the magistrate may result the whole process of deprivation to be unlawful.

Practically, it is common among individual police officers to violate sections 25 and 28 by keeping suspects under their custody for more than twenty-four hours before they present them to the court. For instance, in August 1994 Mr. Said Mohammed Hilal was arrested and detained at Madema police station in Zanzibar town for three month without being produced before the court⁹⁰. Another example involved two convicts met by the International Fact-finding Mission (FIDH) in Zanzibar Central Prison namely Mr. Emmanuel and Mr. Geredje who were both arrested in November 1998. Mr. Geredje was detained in police custody for three days before he was sent to the judge. In the case of Mr. Emmanuel, he was first detained for few days, then freed, and rearrested a few days later, when he stayed for another two days in police custody before sent to the court⁹¹. To keep suspect under custody more than twenty-four hours not only contravenes the domestic law⁹² but also the international human rights instruments of which Tanzania is a party. For instance, in the case of *Borisenko v. Hungary* (852/99), the HRC held that detention of the suspect for three days prior to presentation before a judicial officer constituted a breach of article 9(3) of the ICCPR⁹³.

There are events where individual police officers have used arrest and detention power for purposes other than to bring the arrested persons before the court. All police officers know

⁹⁰ see Hilal v. the United Kingdom, application no. 45276/99

⁹¹ FIDH-LHRC report, International Fact-finding Mission, “TANZANIA: THE DEATH SENTENCE INSTITUTIONALIZED?” 414/2- April 2005, p. 26.

⁹² See Chapter three para 3.2.6

⁹³ S Joseph, J Schultz, and M Castan, the International Covenant on Civil and Political Rights; cases, materials and commentary, 2004 p. 324

that their power to detain suspects of crime is limited to twenty-four hours. However, some of them intentionally plan to effect arrest during weekends so that the arrested persons can spend more time in their custody thereby, create conducive environment for bribery. How does this happen? When the arresting officer has motive for corruption, if the suspect is to be arrested on Thursday, for example, the officer delays the arrest until Friday as the courts are not in session on Saturday and Sunday. Thus, the suspect spends the whole weekend in police custody if no bribe is given and if lucky he may be sent to the court on Monday. This practice amounts to arbitrary enforcement of the law and contravenes section 25 of the CPA which requires any police officer arresting any person without warrant of arrest to send the arrested person before the court within twenty-four hours⁹⁴.

There are incidents whereby some police officers especially those on night patrol misuse section 21(f) of the CPA that allows any police officer to arrest without a warrant any person found “in any high way, yard or other place during the night ...” on suspicion that he has or is about to commit a criminal offence. It is well known that during weekends many young people enjoy to spend their precious time in such places like pubs, nightclubs and return home late in the night. On their way back home some of them become preys to corrupt police officers. Because the purpose of arrest is bribery, the arresting officers are very often unwilling to release reliable suspects on police bail even where the suspects are in a position to provide assurance that they will appear in court or at police station when so required. There is a common say in Tanzania among the public that says, “it is free to get into police station but one has to pay before one leaves the station”. Everyone knows that whoever goes at police station will need money either to buy his freedom if he is a suspect or to facilitate arrest of his suspect if he is a complainant.

These kinds of abuse of due process of the law are rampant among the individual police officers in Zanzibar and Tanzania as whole. The Tanzania Police spokesman, Senior Assistant Commissioner of Police (SACP) Aden Mwamunyange admitted having some ‘rotten apples’ in the form of police constables and officers who violate professional ethics

⁹⁴ see chapter three para 3.2.6

and very often police authority has taken disciplinary actions against them⁹⁵ subject to section 47 of the Police Force Ordinance. For instance, during November 2004 at Nungwi Beach in Zanzibar, five police officers sold tourists narcotic substance known as ‘bhang’ instead of cigarettes and later arrested them for allegedly possessing the drug. They threatened to press charges against the tourists if they did not part with US \$ 300 (about Tanzania shillings 330,000/-). The tourists obliged but later reported the matter to the police authority who arrested the five police officers. They were identified and brought before a court martial and sacked for gross misconduct⁹⁶. The unlawful deprivation of liberty invites criminal sanction for wrongful confinement contrary to section 260 of the Zanzibar Penal Act. Being employed in the public service, police officer may also be convicted for abuse of authority of his office contrary to section 81 of the Zanzibar Penal Act.

4.2.3 The Right to release pending trial.

By virtue of article 9(3) of the ICCPR person awaiting trial on criminal charges shall not as a general rule, be detained in custody. The HRC has held that “... pre-trial detention should be an exception and as short as possible”⁹⁷. Further, the HRC provides that pre-trial detention must not only be lawful, but also be reasonable and necessary in all circumstances for instance, in order to ensure appearance of the suspect before his trial, to prevent flight of the suspect from the jurisdiction of the state, to prevent interference with evidence or the recurrence of criminal offence⁹⁸. In addition, Principle 6 of the Tokyo Rules provides that pre-trial detention should be used as a means of last resort and alternatives to pre-trial detention should be employed at early stages in the criminal proceedings. Although these principles are not binding but the HRC has emphasized that most of the standards for treatment of persons deprived of their liberty are found in non-binding human rights instruments of the United Nations. Therefore, states parties to the

⁹⁵ British High Commission Dar es Salaam, Kiswahili Press Summary, “*POLICE ADMITS HABOURING ROTTEN APPLES*”, 22 April 2005

⁹⁶ Issa Yussuf, Zanzibar correspondent, the Guardian (Tanzanian), “*5 POLICE OFFICERS SACKED FOR BRIBERY*” dated 12.11.2004 available at <http://www.ippmmedia.com> visited 12.11.2004

⁹⁷ see HRC General Comment 8 para 3

⁹⁸ see Van Alphen v. the Netherlands (305/1988) 23 July 1990, Report of the HRC Vol. II. (A/45/40) 1990

ICCPR are required to apply the relevant standards applicable to the treatment of all persons deprived of their liberty⁹⁹.

The two Constitutions explicitly recognize the right to personal liberty and the presumption of innocence. Hence, the CPA has established procedures whereby the suspect may be released on bail pending trial. When the suspect is released on bail he is not set free completely but he is released from the custody of the law-enforcing agent and entrusted to the custody of his sureties who are bound to produce him on the specified time and place to answer the charges against him¹⁰⁰. Section 30(4) of the CPA requires the police when “practicable to assist the suspect for sureties on his or her behalf”. Additionally, section 31 of the Police Force Ordinance Cap.322 provides that no fee or duty shall be chargeable upon bail bonds taken by any police in criminal cases. It can be seen that the law makes the release of suspect on bail very smooth but in practice the police and the magistrates of the lower courts honor the law more in breach than in observance. This is because in most cases it is a bribe that determines whether bail is to be granted to the suspect or not as result majority of suspects have been denied their right to bail because they are unable to bribe the police and court officials. The following are few examples:

Mr. Nassor Hamud Salum¹⁰¹ (49) an ex-prison officer was arrested on the 19th April 2005 and was charged with vagrancy at Mwanakwerekwe Police station an offence that entitled him to release on bail. Nevertheless, bail was denied at police station because, in his view, he was unable to bribe the police. During his first appearance before a magistrate at Mwanakwerekwe District Court on 21st April 2005 the bail was again denied but he was released after his relatives parted with Tanzania shillings (Tshs.) 55,000/- to a police prosecutor¹⁰². Mr. Mohammed Juma Mohammed (48) an ex-police officer was arrested by the anti-riot police (Field Force Unit - FFU)¹⁰³ without warrant at his house in the midnight

⁹⁹ see HRC General Comment 21 para 5

¹⁰⁰ see chapter three para 3.2.5

¹⁰¹ Interviewed on 19th June 2005 at Stone Town Zanzibar

¹⁰² In Tanzania , police prosecute accused persons in District/Magistrates’ courts. State Attorneys prosecute accused persons in the High Court on capital offences like murder and treason.

¹⁰³ It is not common for the police officer attached to the FFU to arrest suspects of crime except at riot scenes.

when the registration of voters in the Permanent Voter's Register (PVR) entered its third day at Kinuni constituency¹⁰⁴. He was held at Mwanakwerekwe police station for two days before sent to a magistrate at Mwanakwerekwe court. In the first appearance at the court he was granted bail on executing bail amount of Tshs. 120,000/- but he was unable to furnish the said amount. Therefore, he was taken to Zanzibar Central Prison Kilimani for two weeks. From experience, Mr. Mohammed could have escaped the two weeks detention at Central Prison if he could talk and bribe the prosecutor and court officials.

Section 150(3) of CPA requires magistrates to pay due regard to circumstances of the case while fixing bail amount. It also states that the amount should not be excessive. The fact that majority of Zanzibaris are categorically poor¹⁰⁵, it is not possible for an ordinary person to raise Tshs. 120,000/- to bail himself. Therefore, it is believed that magistrates of the lower courts set traps by fixing high bail amount so that a suspect or his relatives will negotiate the amount with prosecutors or court officials out of court. This provides the magistrate and police prosecutors an opportunity to solicit and accept bribes from the accused. This is easy because the police officers prosecute cases at Magistrates' court and while determining whether bail is to be granted to the accused or not, magistrate has to consider the opinion of the prosecutor. Thus, magistrates and prosecutors in most cases work together in the business. These few incidents clearly indicate that the law enforcers violate the Constitutional right of the suspect to be presumed innocent and to be treated according to such status. This practice is against section 31 of the Police Force Ordinance which prohibits the police from charging fee or duty upon bail bond and section 30 of the CPA which guarantees bail pending trial. The practices of the magistrate of the lower courts also contravene the requirements of section 150 (3) of the CPA which provides that "[t]he amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive."

¹⁰⁴ The registration process was characterized by violence resulted serious injuries to many people and loss property

¹⁰⁵ Justice Hamid M. Hamid, *"Access to Justice in Perspective on Legal Aid and Access to Justice in Zanzibar"* p. 84

4.2.4 The right to legal counsel.

Notification of the right to have assistance of legal counsel is one of the most important rights any suspect of criminal charges needs to know. The HRC held that legal assistance should be available to the suspect immediately upon arrest or detention¹⁰⁶. The 1990 United Nations Basic Principles on the Role of Lawyers states clearly that pre-trial detainee should have access to legal counsel in any case no later than forty-eight hours from the time of arrest or detention¹⁰⁷. Under domestic law, section 30(3) of the CPA requires every police officer to inform the suspect about his right to have a lawyer or other friend present during interrogation. This means the law foresees the consequences that may be suffered by the suspect in the hands of the police during interrogation if not accompanied by a lawyer or a relative. This safeguard ensures that suspect is not compelled to testify against himself and protects him against torture and ill treatment during interrogation. Despite the importance of this right most suspects do not have a lawyer, a relative or a friend before interrogation takes place consequently they suffer limitations of this right. Here are some of the difficulties that prevent suspects from exercising their right to legal counsel.

There is overall lack of awareness among many people in relation to the right to have a legal counsel or any other person present during interrogation. Besides, many suspect even if they know about this right financial problems prevent them from hiring a lawyer. Legal assistance at state expenses is limited to offences which attract capital punishment like murder and treason. This means that any person accused of any other offences must find ways and means to secure legal assistance. Although the law requires the police to inform suspect of this right, nevertheless, most police officers are not willing to have third party once the suspect is in their custody as it happened to one Mr. Suleiman Mkuza Juma (35) on the 2nd May 2005. He was arrested by the police and detained at Madema Police station from around 9:00 am to 5:00pm without being informed of his charge let alone his rights. He asked the police officer to allow him to contact his brother who is also a police officer

¹⁰⁶ refer chapter three, para 2.5

¹⁰⁷ see Principle 7

at Ziwani Police Barracks (not far from Madema Police) but without success. He was released without charge at 5:00pm.¹⁰⁸

Where the suspect is informed it is done just as a formality because the police makes it impracticable due to the fact that during interrogation they expect to get more information as to whereabouts of evidence or other accomplices still at large. This means police do not want presence of a lawyer because in the course of interrogation very often oppressive methods are employed based on the psychology entertained by most police officers that it is easier to ‘burst a case’ by ‘beating the hell’ out of a suspect. Employing oppressive methods is an indication of lack of necessary interrogation techniques on the part of police officers. Therefore, it is very clear that in most cases interrogations at police stations are conducted in the absence of a lawyer or a relative, hence, “almost all statements produced before the court do not show anywhere that there was a lawyer, a friend or relative when it was taken”¹⁰⁹. Thus, rights of the suspects become under serious risk of being violated. Denying suspect of his right to have immediate access to a lawyer restricts his right to defend himself. This constitutes violation Article 13(6)(a) of the Constitution of the United Republic of Tanzania and also article 14(3) of the ICCPR which guarantee the right to fair trial.

4.2.5 Treatment of pre-trial detainees

Article 10 (1) of the ICCPR requires states parties to treat “persons deprived of their liberty with humanity and with respect for their inherent dignity of the human person”. This right is recognized in other human rights instruments both binding to states parties and non-

¹⁰⁸ Interviewed on the 19th June 2005. Mr. Suleiman was tortured by police officers to the extent that he underwent one-hour operation at Mnazi Mmoja Hospital due to sustained injury. Mr. Suleiman informed this author that he had rupture in the intestine and his kidney was affected. After operation his stomach had protruded and he could not eat food because all time he felt his stomach is full, therefore, he lived by drinking few cups of water alone. This incident of torture was also reported in Alasiri, an evening Kiswahili daily by Mwinyi Sadallah, Zanzibar Correspondent, “*POLICE ZANZIBAR WADAIWA KUMPASUA UTUMBO RAIA*” dated 10.05.2005 available at <http://www.ippmedia.com>. Mr. Suleiman died on the 27th July 2005 and it is alleged that his death was associated with the injuries he sustained from the torture by the police.

¹⁰⁹ see Mchome, S.E, Assistant Lecturer in Law at University of Dar Es Salaam, Tanzania, in his paper “*Brief Survey of the Law Relating to the Treatment of Suspects and Accused*” (undated) p. 11

binding such as the United Nations Body of Principles and the United Nations Standard Minimum Rules (SMR). The requirements of article 10(1) imposes a positive obligation on states parties to ban the use of torture or other cruel, inhuman or degrading treatment against persons deprived of their liberty who are considered as vulnerable¹¹⁰. The HRC reiterates that persons deprived of their liberty should not “be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons”¹¹¹. The right to be treated with humanity and respect for human dignity is a fundamental and universal applicable rule that states parties cannot escape this obligation by justifying inhuman treatment due to lack of financial resources. Because being party to the Covenant, states agree to observe all the rights set forth in it¹¹². In relation to persons deprived of their liberty states are obliged to provide detainees with services that satisfy their basic needs such as food, sanitary facilities, bedding, medical care, access to natural light, and communication.

The Constitution requires that “human dignity shall be protected in all activities pertaining to criminal investigations and process, and in any other matters for which a person is restrained”¹¹³. The Zanzibar Constitution further provides that limitations on the enjoyment of rights and freedoms in it should not interfere with the right to freedom from torture, inhuman and degrading treatment.¹¹⁴ Prohibition of torture is also found in articles 13 (6) (e) of the Union Constitution and 13 (3) of the Zanzibar Constitution. Section 35 of the CPA which apart from prohibiting torture it requires police officers to take reasonable action as is necessary to ensure that persons under restraint are provided with medical treatment, advice or assistance in respect of illness or injury whether such person requests or it appears to the police officer that such assistance is needed. However, there is a wide

¹¹⁰ General Comment 21 para 3

¹¹¹ *ibid*

¹¹² *Bernad Lubuto v. Zambia, Communication No. 390/1990*, UN Doc. CCPR/C/55/D 390/1990

¹¹³ article 13(6)(d) of the Union Constitution

¹¹⁴ article 24 (1) as per the Eight Constitutional Amendment of the Zanzibar Bill of Rights which came into force on May 2002

gap between the protection guaranteed under the law and the actual situation in all places of detention.

According to a report of Zanzibar High Court Judge, Hon. Mshibe Bakar, pre-trial detainees in Zanzibar central prison experience worse conditions that constitute inhuman treatment and violate human dignity. During his visit into the prison on the 8th March 2000 there were 439 prison inmates out of this figure 340 were pre-trial detainees. This indicates that the number of pre-trial detainees is much higher than the convicted persons. The report revealed that eighteen pre-trial detainees were accommodated in a tiny single cell that has insufficient ventilation. In fact the prison building where persons awaiting trial are held is very old and not repaired for a long period of time. When the FIDH delegate visited the prison, there were also problems with the availability of clean and safe water. Although there is a health care service the level of care is poor to the extent that pre-trial detainees are left without medical care for hours despite visible health problems¹¹⁵. In the treason case which involved eighteen CUF leaders, at a pre-trial hearing on the 9th July 1998, one of the accused Mr. Machano Khamis Ali was unable to stand up because of his critical health condition. The presiding magistrate had to order that medical specialist must be sent to examine health of the defendant in prison. The eighteen detainees were denied treatment by medical doctor of their own choice and also the authority refused to allow them to be taken for treatment to better medical facilities in Dar es salaam (Mainland Tanzania). Most of these detainees were in poor health, such as deteriorating vision, loss of weight, nervous tension, high blood pressure, skin infections, and malaria as a result of inadequate mosquito protection¹¹⁶.

It should be remembered that humane treatment and respect for the dignity of the pre-trial detainees is a basic standard of universal application which cannot depend on material resources. By justifying deprivation of liberty, states take responsibility to observe this principle as regard to treatment of all persons detained pending trial. Therefore, the

¹¹⁵ FIDH-LHRC report, p. 31

¹¹⁶ Amnesty International, AI Index: AFR 56/001/2000 27 January 2000 available at <http://web.amnesty.org/library/index/engaf560012000> visited on 10.11.2005

Zanzibar Government is duty bound to provide medical care to all persons under custody, as they cannot obtain such care for themselves. Denying detainees better medical treatment available in the Mainland Tanzania amounts to lack of responsibility on the part of the authority to care for the health of the detainees. Thus, the government violates its responsibility under international law which requires every state parties to take necessary steps to ensure pre-trial detainees enjoy the rights recognized within international human rights law.

The pre-trial detainees in police stations experience worse treatment than the convicted persons in prisons. For instance, in the case of *Hilal v. the United Kingdom*, it was revealed that suspects at Madema Police station are subjected to torture, inhuman and degrading treatment. In this case, the applicant was Mr. Said Mohammed Hilal a Tanzanian born in Pemba island seeking asylum in the United Kingdom. He informed the Court that in August 1994 he was arrested and detained at Madema police station for a period of three months of which he was repeatedly locked in a cell full of water for days that he was unable to lie down. He was hung upside down with his feet tied together until he bled through the nose and was also subjected to electric shock. In 1998 the US State Department Report on Tanzania Human Rights practices stated that police in Zanzibar notably in Pemba use torture during arrest and interrogation. The same measures are used to obtain information about suspects from family members not in custody, the report said. It is also revealed that some police cells do not have toilets and detainees have to use tins, bottles, plastic bags and buckets for toilets. According to Mr. Nassor Hamudi Salum¹¹⁷ the cell he was detained at Mwanakwerekwe police station along with others was very small, and they had to sleep on shift on the floor. While some detainees sleep others have to stand until their turn. The poor detention facilities at police stations in Tanzania may be exemplified by one shocking incident whereby 17 pre-trial detainees died of suffocation at Mbarali police station on the 17th November 2002 due to overcrowding. The dead were among the 112 detainees held in a tiny cell capable to accommodate only 30 persons.¹¹⁸

¹¹⁷ Interviewed on the 19th June 2005 in Zanzibar

¹¹⁸ Legal and Human Rights Centre (Tanzania), Tanzania Human Rights Report 2002, p.21

4.2.6 The right to challenge the legality of deprivation of liberty.

This right safeguards the right to liberty and protects individuals against arbitrary detention. The Governments are required under the international human rights instruments to create effective mechanism for individuals to challenge the lawfulness of detention and obtain release if the detention is unlawful. Such procedures must be simple, expeditious, and free of charge for poor persons¹¹⁹. The domestic legal framework provides judicial system whereby the High Courts is conferred with exclusive powers to hear cases of violation of fundamental rights and freedoms within the United Republic of Tanzania¹²⁰. However, there is doubt about the effectiveness of the system especially with regard to its accessibility. One of the requirements of effective complaint mechanism is that it must be easily accessible to the potential complainants.

The fact that there are few High Court Centres in Tanzania, exercising this right in practice especially for the poor persons is practically difficult if not impossible. This is because complainants have to travel from distant areas to these centres at their own expenses of which many of them cannot afford. For instance, in Zanzibar the High Court is located in Unguja Island, therefore, residents of Pemba Island suffer limitations of access to the High Court because they have to travel to Unguja and accommodate themselves at their own cost. Besides, there are other obstacles like high level of ignorance about the availability of the procedure and how one goes about invoking it. Also due to technical problems involved in filing cases in the High Court, services of the legal experts is needed to ensure that the complaint is properly formulated and supported. The fact that majority of people are poor, they cannot afford to hire lawyers. Under such situation it is very clear that this right is not exercised as a result even the right to compensation for unlawful deprivation of liberty has not yet been tested in the High Courts¹²¹. This situation obviously amounts to denying many poor persons of their rights to justice especially where state agents have unlawfully

¹¹⁹ see the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly resolution 43/173 of 9 December 1988, Principle 32(2)

¹²⁰ see article 30(3) of the Union Constitution

¹²¹ James L. Mwalusanya, *the Protection of Human Rights in the Criminal Justice Proceedings-Tanzania Experience*, in M. Cherif Bassiouni & Ziyad Maotala, *the Protection of Human Rights in African Criminal Proceedings*, Kluwer Academic Publishers (1995) p.302

deprived their right to liberty. In this regard, the domestic legal systems fail to provide a an effective mechanism which is simple especially to the poor persons to challenge legality of deprivation of their right to liberty and seek effective remedy where such deprivation is unlawful. Consequently, the government breaches an international human rights obligation to provide effective remedies to individuals whose rights and freedoms have been violated. Because conferring exclusive jurisdiction to the High Court on all matters in relation to individual rights and freedoms limits their enforcement by majority of the aggrieved persons and thereby defeats the principle of easy access to justice.

4.3 Conclusion.

This chapter has elaborated the existing gap between what the law provides as rights and practices of individual law enforcement officers. The law gives powers to the police essential in the performance of police duties. These powers are limited in different ways in order to protect fundamental rights and freedoms of individuals. The above discussion has illustrated abuse of powers by the police and violations of the right to personal liberty and the rights of pre-trial detainees. Individuals have been deprived of their liberty unlawfully and have been denied their right to a fair trial. Presumption of innocence, which is a fundamental principle of pre-trial detainees is not respected, as a result suspects of criminal offence have been subjected to conditions and treatments that amount to torture or inhuman or degrading treatment. The police officers should remember that persons suspected of criminal offence have not been convicted of the offence by the court. Therefore, the police officers are under legal obligation to protect and respect all rights of persons under their custody during the entire period of investigation. The findings reveal that corruption has become a common practice in police stations that even getting police bail requires paying off the police officers. Every police officer should understand that their individual or collective misconducts affect the entire police force and seriously undermine public faith in the police. Consequently, members of the public may refuse to cooperate with and assist the police in their daily duties. This situation may lead to reduction in police effectiveness in the fight against crime in the society.

5 UNDERLYING CAUSES FOR VIOLATION OF RIGHTS OF PRE-TRIAL DETAINEES IN ZANZIBAR

5.1 Introduction

Chapter four has shown that practices of individual law enforcement officials do not conform to the rule of law. This chapter will examine and discuss some of the causes associated with violations of the right to individual liberty and rights of pre-trial detainees. Different approaches applied in certain countries in solving problems facing protection of human rights of pre-trial detainees will be referred to in order to help the police and the government to consider whether they can be applied in Tanzania to improve the law and practices.

5.2 Causes of violation

The following are some of the underlying causes for violation of right to liberty and rights of the persons deprived of their liberty.

5.2.1 Corruption.

The United Republic of Tanzania, like most developing countries faces corruption in its public and private sectors. The government views corruption as public enemy number one and its policy on the fight against it is “zero tolerance”¹²². Thus, the government has taken a number of preventive measures to deal with corruption. For instance, in 1995 the President of the United Republic of Tanzania appointed a Presidential Commission of Inquiry Against Corruption (PCIC) commonly known as the Warioba Commission to study the extent of corruption in all government departments and institutions and to recommend measures. The findings of the Warioba Commission revealed that police force is one of the government departments where corruption is deeply entrenched.

¹²² The United Republic of Tanzania, *The National Anti-Corruption Strategy and Action Plan for Tanzania*, President’s Office, State House, Dar es salaam Tanzania, November, 1999 p.1

5.2.1.1 Concept of corruption

The concept of corruption in the Zanzibar legal system refers to specific actions of individuals which amount to corrupt practices under the law. The Zanzibar Penal Act in its section 76(1)(a) provides that any person by virtue of employment in public service “corruptly asks for, solicits, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or other person on account of anything already done or omitted to be done, by him in the discharge of the duties of his office” is guilty of an offence of corruption. In addition, paragraph (b) of section 76(1) declares guilt of the offence any person who gives corruption by stating that;

“Anyone who corruptly gives, confers, or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, upon, or for any person employed in the public service...any property or benefit of any kind on account of any such act or omission on the part of the person so employed shall be guilty of the offence”

From the legal point of view, corrupt act involves two parties who engage in exchange of some benefit that is not legally required in return for favourable treatment with regards to the discharge of powers or responsibilities of an office. However, the scope of legal definition of corruption is limited because it excludes many forms of police behaviour that may be considered as corrupt practices. For instance, the ‘two party involvement’ excludes activities of individual police officer who engages himself alone in acts like theft from crime scene, selling of seized or recovered property. Sociological approach of the concept of corruption is considered as broader and provides accurate reflection of what is commonly referred to as corruption. This approach “places emphasis on morality and has its root in the classical conceptions of corruption which sought not so much to identify behaviour, but to judge the overall political health of a society and its institutions”¹²³. This approach is also viewed as too vague and depends on an agreement of what is morally

¹²³ Taleh Sayed and David Brace, *Police Corruption: Towards a working Definition* [online], published in African Security Review Vol.7, No.1, 1998 available at <http://www.iss.co.za/Pubs/ASR/7No1/SayedBruce.html> visited 24.03.2006

proper. Nevertheless, it is applicable to a wide range of cases that may be understood as corrupt practices by members of the public.

According to sociological point of view, police corruption “refers to police officer’s accepting money or goods in return for engaging in activities they are obliged to do under terms of their employment, for activities that are prohibited under the terms of their employment, or for improper exercise of legitimate discretion”¹²⁴. Thus, police corruption can be viewed as abuse of powers and authority by individual police officers acting officially for personal interests. As shown in chapter four, one of the dangers of police corruption is that fundamental rights of persons deprived of their liberty are not safe. Based on what is daily reported in the local newspapers, police corruption has different forms in Tanzania. For instance, payoffs to police by individuals who violate traffic laws, narcotic addicts, professional burglars, and prostitutes¹²⁵. Also individual police officers have been involved in extortion of money and or narcotic from narcotic violators in order to avoid arrest and in some cases they have been involved in selling narcotic to get money¹²⁶.

The Tanzania Police Force has taken different measures to deal with corruption within it. For instance, in order to reduce opportunities for corruption at police stations, the police force has published leaflets and posters setting out the rights of persons arrested and detained at police stations. In addition, the police force has been undertaking public awareness raising campaign through radio and television programs addressing the issue of corruption thereby seeking public opinion and cooperation. In these programs, members of the public are made aware of their rights while in the hands of the police and also of their

¹²⁴ M. McMuller, “A Theory of Corruption”, Sociological Review, Vol.9 (1961), pp.181-201; quoted from Anthony Dedrick Castberg, *120th International Seminar Visiting Experts’ Papers*, [online] <http://www.uafei.or.jp/English/pdf/PDFrms/no60/ch08.pdf>, visited on 04.03.2006

¹²⁵ The Inspector General of Police, singled out police officers attached to the traffic and criminal investigation as the worst corrupt in the police. he made this assertion in a two days anti-corruption seminar for senior police officers in Songea. See the Guardian Newspaper, *Mahita: Police Force Needs Cleaning Up*, dated 30 September 2004

¹²⁶ See chapter 4 para 4.2

duty to report and complain when any police officer behaves corruptly¹²⁷. Other measures include punishing those police officers involved in corruption¹²⁸. However, in the midst of all these initiatives corruption is still a problem that undermines rights of the pre-trial detainees and assumes an endemic proportion within the police force and in the country in general. It is important now for the authority to ask itself what are major root causes of corruption among the police officers. It is also worthwhile to start by reconsidering the working conditions of the police officers in particular of the lower ranks; their salaries¹²⁹, frequency of promotion, working environment, living conditions and retirement benefits. These may be among the basic factors of police corruption in Tanzania.

In Nigeria, when Obasanjo became president after General Sani Abacha in 1999, the Nigerian Police had a reputation for corruption and violence. Police officers were not motivated during the Abacha regime hence they indulged into corruption practices and there were increased violent crimes across Nigerian streets. Under Obasanjo, the government adopted a five years Development Plan for the police welfare. Under this plan salaries of the police were raised over 30% and were paid on time, promotions, which were rare during Abacha regime, were increased. Within the police, the authority adopted strict measures to eliminate the vice and this led to daily arrests and dismissals of police officers involved in corruption. Despite all these policies and programs there were no significant changes on the behaviour of the police. This was due to lack of greater political support and higher priority in the police budgeting¹³⁰. According to US Department of State Report on Human Rights Practices in Tanzania (2004), the Tanzania police is under funded, inefficient and characterized with excessive use of force, police corruption, very slow to investigate crimes and prosecute criminals. Thus, these two cases share similar limitations in the fight against corruption and the solution rests with the politicians. It is also important to consider the fact that police officers live and work within the community they serve. If the political community is itself corrupt the fight against it will end up on platforms.

¹²⁷ This author was among the participants in the preparation and distribution of posters and leaflets and also was involved in the organization of anti corruption seminars within the police early 2004

¹²⁸ See Chapter four

¹²⁹ at present new entrant into the police receives less than equivalent to USD 100 per month as salary

¹³⁰ Innocent Chukwuma, "*The Future of Police Reform in Nigeria*", [PDF online]

Because in such situation even the most honest police officer may be influenced to engage into corruption. Therefore, the fight against corruption should involve every sector in the community.

5.2.2 Lack of qualified personnel.

One of the aspects to ensure rights of pre-trial detainees are protected is to recruit and select qualified people into the law enforcement profession. While there is no universally acceptable standard of what level of education that is most appropriate for a new recruit, it is clear that requirement of college or university education would bring into the police a more mature persons with a broader perspective, sound judgment, and a good understanding of social, cultural and community issues. It also provides police officer with additional qualities to face problems while on duty. In 1931, a United States Presidential Commission on Law Enforcement and the Administration of Justice (Wickersham Commission) in its findings noted that higher education is necessary for effective policing. It suggested that police officers should have a minimum of two years of college and supervisors and administrators should have four years. Another report published in 1973 by National Advisory Commission on Criminal Justice Standards and Goals, Police (Washington, DC) recommended that a basic entry-level should be a baccalaureate degree and also to avoid limiting the broad experience required for an effective law enforcement agency, diversity of degrees is necessary.¹³¹ It is worth mentioning here that Tanzania Police in the Mainland since past few years has been taking into the police a good number of graduates of various degrees in every intake¹³².

As for Zanzibar the situation is different because the whole process is based on one's place of origin and political consideration¹³³. According to a report of the Fact Finding Mission

¹³¹ Principles of Good Policing: Avoiding Violence Between Police and Citizens, revised edition 2003 [online] www.usdoj.gov/crs

¹³² selection and recruitment is done separately between Zanzibar and the Mainland although the new entrant attend same recruit course at the same time. Same system applies to promotion

¹³³ in 1998 this author after graduation he applied to join the police but without any just reason he was told by the authority that in order to be accepted he must obtain approval of the Minister for Home Affairs or the

to Zanzibar, recruitment process for new entrant into the police is effected through the 'Maskani',¹³⁴ on the recommendation of the ruling party "Chama Cha Mapinduzi or *Revolutionary Party* (CCM) branches¹³⁵. Besides, since the aftermath of the elections of 1995 and 2000, several employees believed to be sympathizers with CUF were demoted or dismissed from their positions¹³⁶ because "a place of origin was a far better off qualification than performance"¹³⁷. This has lead to serious mistrust, as a result qualified persons are not trusted to work in the government departments. For instance, in 1998/9, out of more than 200 new recruits selected from Zanzibar to attend the course in the Mainland there were only two graduates (including this author), less than ten were advanced level secondary school leavers and the rest had either completed primary education or standard ten (Form two). However, there were many applicants with advanced secondary education but were disqualified on the above grounds. This is purely a discrimination that is prohibited under various international human rights instruments. As was experienced during the training, academic performances of these people were extremely poor. Under such circumstances there is no doubt that it is difficult to expect a person with primary education to properly follow the training and finally execute his duties according to the requirements of their profession. It is most likely such police officers will resort to the use of force instead of being professional when dealing with crime and suspects under their custody.

5.2.3 Limitations of Police Training.

In the administration of criminal proceedings, investigation of alleged crime is an important stage which has big impact on the right of the suspect to a fair trial and also on the protection of the rights of suspect during the entire process of searching the truth. If the investigation is carried out lawfully it protects the rights of the suspect to a fair hearing

Inspector General of Police. What came to his mind was he was denied his right because he was born on the part of Zanzibar which is said to be a strong hold of one strong opposition political party in Zanzibar.

¹³⁴ Originally vigilante groups converted into political mobilization groups of the ruling party CCM

¹³⁵ Joseph Oloka-Onyango and Maria Nassali (eds.), *Constitutionalism and Political Stability in Zanzibar: the Search for a New Vision* 2003, p.72

¹³⁶ Kjetil Tronvoll, *Political Reconciliation and Elections in Zanzibar: some comments on the implementation of the Muafaka accord and the sustainability of the democratisation process*. A report submitted to the NORAD/MFA, November 2004, p.44

¹³⁷ see Draft Report: *Training Needs for the Legal Sector in Zanzibar – December 2003*

whereas if carried unlawfully then the rights to a fair trial is jeopardized. Therefore, it is imperative to equip police investigators with better techniques that are compatible with state's obligations under international law. Their training should concurrently focus on searching for the truth and on the protection of physical and legal integrity of individuals. Thus, the training should enable them understand the importance protection of the right to liberty and security of the person, prohibition of torture and respect for human dignity. Likewise, they should be made to understand protection of legal rights of the individual such as the right to recognition before the law, equality before the law and the right to fair and public hearing. This should be emphasized during the training of the new entrants into the police.

In Tanzania the basic police training focuses mainly on the protection of legal integrity. The new recruits receive relevant basic notion of substantive and procedural law in particular the Criminal Procedure, Penal Law, Police Duties, Criminal investigation, Traffic law and Police General Orders (PGO) which contains police ethics and code of conducts. From experience, during the basic training too much time is devoted to drill exercise which is not bad for example, to emphasize teamwork and discipline. However, there should be a balance between the time spent on the drill and the theory in the classes. When this author was attending the basic recruit course, drill exercise used to start in the morning and when attended lectures in the classroom in the afternoon most of the recruits were sleeping as they were tired. No doubt majority finished the course without even understood what constitutes police duties. On the other hand rank and file police officers who deal with pre-trial detainees in their daily work are not equipped with deep understanding of the human rights principles and the rule of law. For instance, human rights subject is not a part of the curriculum at the Police Training School where basic recruit course is done. However, it has been included in the permanent curricular of the Police College Dar es salaam for the officers attending promotion course in particular from the rank of Assistant Inspector of Police.

5.2.4 Political misuse of law enforcement agency.

Political manipulation of the law enforcement undermines the whole concept of rule of law and results violations of fundamental rights and freedoms guaranteed under various international human rights instruments. For instance, using the police to deprive individual of their right to liberty for political ends. It is reported that governments across the Southern African Development Community (SADC) misuse the law enforcers to suppress public meetings, demonstrations or campaigning by opposition, intimidating sympathizers of the opposition including unlawful arrest and detention¹³⁸. Professor Chris Peter Maina of the University of Dar es salaam asserted that cases of human rights violations in Zanzibar usually become rampant during election campaigns due to misuse of privileges by political leaders¹³⁹. The high-ranking political officials or influential people within the political set up consider themselves to be above the law hence use the police as a cover to deprive individuals of their right to personal liberty and security. There are reports alleging that since the aftermath of the first multiparty election 1995, the Zanzibar authorities have become increasingly hard-line against prominent members and supporters of the opposition political party, the Civic United Front (CUF). They are arrested, detained, harassed and intimidated by CCM youths in the presence of the police and by the police¹⁴⁰. Despite orders against these acts from the Inspector General of Police, police officers in Zanzibar continued their harassment of the CUF members¹⁴¹. One may ask where do these police officers in Zanzibar get confidence to disobey lawful orders of their superior police commander. Since 1995, Zanzibar has experienced many arrests of persons because of their political affiliations. It is true that some of them have been arrested on reasonable grounds but there are many incidents where arrests or detention has indicated political motives behind. For instance, in April 1996, a CUF parliamentarian, Salim Yusuf Mohammed was

¹³⁸ Amnesty International. Policing to protect human rights; a survey of police practice in Countries of the Southern African Development Community, 1997-2002 (AI Index: AFR 03/004/2002) pp.24 available at <http://web.amnesty.org/library/Index/ENGAFR030042002?open&of=ENG-TZA> visited 8.11.2005

¹³⁹ Issa Yussuf, the Guardian (Tanzania), “*ISLES HAUNTED BY HUMAN RIGHTS VIOLATIONS*” dated 11 September 2004

¹⁴⁰ see Amnesty International Report, AI Index: AFR 56/009/2000 26 My 2000

¹⁴¹ see Tanzania Assessment, Country Information and Policy Unit, Version 4, September 1999, available at http://www.asylumlaw.org/docs/tanzania/ind99b_tanzania_ca.htm#securityforces.

arrested and charged with stealing firearms, however; the Zanzibar High Court dismissed the charges after the suspect had spent three weeks in detention¹⁴².

In the year 2004, the Zanzibar House of Representatives (the Legislature) enacted the “Kikosi Cha Valantia Act” which establishes the Volunteer Brigade as one of the Special Department of the Revolutionary Government of Zanzibar. Under this Act, the volunteers have powers of search and arrest, right to posses and use arms, they have immunity against any act or omission done in the bonafide exercise of their duties, and are supposed to be militarily trained. This was followed by a massive recruitment of which the absolute majority belong to families which are regarded as staunch CCM supporters¹⁴³. Some members of the public doubted that the volunteers are likely to be deployed to political ends because the Zanzibar government has no full control of the police force. The doubt became true from the period of the 2005 election campaigns until and after the election. It was reported that soon after the election, the “security forces, from the police to paramilitary engaged in a campaign of intimidation of the CUF supporters and subjected them to undue brutality.”¹⁴⁴

5.2.5 Lack of awareness of legal rights.

The ignorance about the law and human rights as well as understanding the criminal justice system is a major problem facing majority of individuals in Zanzibar. Persons who do not know their legal rights are unable to claim them before the courts consequently they are easily subjected to unfair treatment when they face criminal charges¹⁴⁵. It has been pointed out that there is overall lack of awareness of the constitutional rights and those contained in various statutes¹⁴⁶. This situation makes it difficult for the suspect to claim their rights and to challenge the lawfulness of their arrests or detention. The HRC has stated that

¹⁴² see Article 19, London; *Zanzibar Democracy on Shaky Foundations*, April 2000 [online pdf] ISBN 1902598199 available at <http://www.article19.org/publications/index.html> visited 12. 01.2006

¹⁴³ Kjetil Tronvoll, pp.44-45

¹⁴⁴ Hassan O. Alli, *2005 Zanzibar Elections: Neither Free, No Fair, November 23, 2005* [online pdf] p.3 available at http://www.zanzinet.org/events/vote2005_Zanzibar_Elections_Neither_Free_Nor_Fair.pdf visited 05.02 2006

¹⁴⁵ refer chapter four para 4.4

¹⁴⁶ *ibid*

governments are duty bound to ensure that individuals know their rights under the Covenant, and that it should be publicized in the official languages in order to enable everyone within the state to understand¹⁴⁷. Therefore, one way of solving this problem is for the government to ensure that human rights education and legal literacy programmes are incorporated into educational institutions. Special attention should be given to vulnerable groups such as detainees, women, children as well as urban and rural people.

5.2.6 Lack of legal assistance.

Prompt access to a lawyer is one of the most important protections against violation of the rights of the persona charged with criminal offence. The right to legal assistance is one of the important components of the right to fair trial in the criminal proceedings. It has been acknowledged that the right a fair trial requires an accused person to be allowed legal counsel during the initial stages of police investigation. A suspect denied assistance of legal counsel is likely to suffer its limitations during the entire period of criminal proceeding. For instance, in the case of *Republic v Mbushuu and Sangula*, Justice Mwalusanya stated that

“... when one considers the fact that most poor persons do not obtain good legal representation as they get lawyer on doc briefs who are paid only 500 Tsh. As a result of such poor remuneration, the defence counsel do not exert enough effort in such cases”¹⁴⁸

Despite the importance of this right, as stated in the previous chapter, many suspects face their charges without the assistance of a lawyer¹⁴⁹. Legal assistance to the poor accused persons in criminal charges is limited to serious offences like murder and treason. The poor litigants in all other charges are only entitled to waiver of court fees when they file their cases. However, the process to get waiver is very complicated and very long. Thus, apart from the possibility of waiver of the court fee, the poor persons in Zanzibar with all legal technicalities in the courts, they are left to defend by themselves.

¹⁴⁷ General Comment 3 para 2

¹⁴⁸ see *Republic v Mbushuu*, TLR (1994)

¹⁴⁹ refer chapter four para 4.4

New approaches to legal aid that are less costly have been developed in various countries in Africa to provide necessary assistance to the poor accused persons. For instance, in Angola, the Bar Association of Angola (BAA) has developed a programme of assistance to suspects in police custody. In this programme graduate lawyers with public prosecutors advise accused persons during interrogations. By October – December 2002, the BAA project had assisted at 1409 interviews at police stations and filed 69 actions requesting the release of illegally detained persons. The project focuses on the poor people at the initial stage of the investigation where most abuses of the rights of the suspect take place in police stations¹⁵⁰. In South Africa, “Campus Law Clinics” system is being used whereby each University has a law clinic staffed by law students and supervised by the academic staff. The main objective is to provide free legal assistance to the poor and at the same time to promote training of the law students and graduates in the skills and values required to practice law. Therefore, the authority in Zanzibar in collaboration with all stake holders in the society should consider the potential of these programmes and see to it that positive measures are taken in order to safeguard fundamental right of the poor of access to justice. In recent years, Zanzibar has opened several higher learning institutions some of which provide law degree. Thus, initiatives may start from there. For instance, as it is required that a law graduate before is allowed to practice law he or she has to attend an internship for not less than six months, and most often at the office of the Director of Public Prosecutor (DPP). These young graduates may be dispatched to police stations and assist the poor suspects. As noted in Angola and South Africa, not only the poor suspects who will benefit, but in the long run it may help to transform the behaviour of the police officers into adhering professional standards of dealing with pre-trial detainees.

5.2.7 Absence of external monitoring body.

The HRC has recommended that it is necessary to have places of detention other than prisons to be visited by magistrate or other independent monitoring bodies¹⁵¹. That means

¹⁵⁰ see *Draft Index, Good Practices in reducing pre-trial detention, PRI, December 2003* p.20 [online] available at http://www.penalreform.org/english/frset_pub_en.htm

¹⁵¹ see Concluding Observations on Sri Lanka, (1996) UN Doc. CCPR/C/79/Add.56 and (2002) UN Doc.CCPR/CO/76/EGY on Egypt

not only the prisons, but even police stations are supposed to be visited by independent bodies. The existence of an independent and effective system of supervision of police lockups is very important to safeguard rights of pre-trial detainees. Impromptu visits of external body to police lockups may help the general public to understand what is taking place inside the police stations. The visits may also serve as a means to shake off confidence of individual and unscrupulous police officers who feel quite confident to abuse pre-trial detainees' rights without intrusion. Currently, there is no external body that supervises police lockups in Zanzibar.

The establishment of the Commission of Human Rights and Good Government was seen as a positive step taken by the Union government to ensure that cases of human rights violations are investigated by independent body in order to ensure law enforcement officials are held responsible for their misconducts, also to maintain standards of behavior. Given the nature of powers vested in all law enforcement officials by virtue of their functions, accountability is an important requirement at all levels and in all situations of their functions. Apart from receiving, investigating and hearing cases of violation of human rights, the Commission is empowered to visit all places of detention with a view to inspect conditions and treatment of detainees and to recommend measures to redress the existing problems.

The law which established the Commission provides that “[t]his Act shall apply to Mainland Tanzania as well as to Tanzania Zanzibar¹⁵².” The Chairman of the Commission for Human Rights and Good Governance, Justice Robert Kisanga, has made it clear that “... we are allowed to work in the entire country. But in Zanzibar, we can only work on Union matters.”¹⁵³ According to the Constitution any law passed in the National Assembly that requires implementation on both sides of the Union has to be endorsed by the Zanzibar House of Representatives to effectively work in Zanzibar. However, in 2003 the House of

¹⁵² Section 3

¹⁵³ By Joyce Mkinga, the Guardian (Tanzania), *Kisanga: Human rights body has no legal role in Zanzibar*, dated 2006-04-04 available at <http://www.ippmedia.com/ipp/guardian/2006/04/04/63528.html> visited 04.04.2006

Representatives rejected the law that established the Commission for Human Rights and Good Governance because of certain contentious issues that need to be amended before its implementation in Zanzibar. The House demands equal roles for Ministers for Justice and Constitution Affairs in the commission because at present the law ascribes roles only to Union Minister for Justice and Constitution Affairs to present human rights. That the minister responsible for human rights in Zanzibar should be clearly stated in the Act and the commission report on Zanzibar should be submitted to the minister who would then submit it before the House for deliberations. Zanzibar also wants the minister in Tanzania mainland making the regulations under that Act to consult his counterpart in Zanzibar. Thus, the Zanzibar Deputy Attorney General, Omar Othman Makungu, said that the Commission would never operate in Zanzibar if the said contentious issues were not solved¹⁵⁴.

Preventing the Commission to operate in Zanzibar where human rights have been violated extensively by the law enforcement official has raised concern within the United Republic of Tanzania. The main issue under discussion is whether the Zanzibar government has a political will to make law enforcers accountable for the human rights violations in Zanzibar. The Director of Constitutional and Human Rights in the Ministry of Justice and Constitutional Affairs of the Union Government, Mr. Fredrick Werema, believes that Zanzibar government lacks political will to allow the Commission to work in Zanzibar. Mr. Werema adds that the law which created the Commission does not interfere with Zanzibar's Constitution, therefore there is no legal requirement to be fulfilled and issues being raised by Zanzibar will complicate the decision making process and bring about stalemate.¹⁵⁵ It is also argued that preventing the Commission to work in Zanzibar is a deliberate effort to block the commission's existence in Zanzibar and is deliberately intended to pave the way for the law enforcing officials especially the special paramilitary institutions of the Zanzibar government, to systematically abuse human rights with

¹⁵⁴ *ibid*

¹⁵⁵ Faustine Rwambali And Wilfred Edwin, *The East African (Nairobi), Tanzania: Dar, Zanzibar Clash Over Rights Body*, Copyright © 2006 The East African. Available at <http://allafrica.com/stories/200603280721.html> visited on 01.04.2006

impunity¹⁵⁶. Here comes the argument that citizens of one part of the United Republic of Tanzania do not have their rights protected in the same way as the rest of citizens within the same territory of the United Republic of Tanzania. The HRC stated that states parties should be aware of the fact that their obligations under the ICCPR “... is not confined to the respect of human rights, but ... they have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the State parties to enable individuals to enjoy their rights.”¹⁵⁷ Therefore, instead of the two parts of the Union to involve themselves in this unnecessary tug-of-war, they should remember their obligations under international human rights law in order to ensure that rights of Zanzibaris are protected and respected in the same way as other citizens in the Tanzania Mainland and also those who violate those rights are brought to justice.

5.2.8 Budgetary Constraint.

Lack of adequate police budgeting affects effectiveness of the police as an institution and individual police officers as a result the situation impinges on the right to personal liberty and security. Proper recruitment and selection, training, working equipment, and reasonable pay all depend on the budgetary appropriations by the government. Low pay and lack of motivation, for example, lead to police corruption¹⁵⁸ because every police officer needs to improve welfare condition of his family. Also the right to personal liberty and security is better protected if police officers get training that conforms with the international human rights standards¹⁵⁹.

¹⁵⁶ *ibid*

¹⁵⁷ General Comment 3, UN Doc. CCPR/C/21/Rev.1 para 1

¹⁵⁸ refer chapter four

¹⁵⁹ see para 5.3

6 CONCLUSIONS AND RECOMMENDATIONS

6.1 Conclusions

This study examines pre-trial detention under the Zanzibar legal framework with reference to the international human rights standards that protect the right to personal liberty and security. From the analysis in the previous chapters the following conclusions can be drawn.

It has been observed that the domestic law recognizes the importance of right to personal liberty and security. It has also incorporated necessary requirements of international human rights standards in relation to pre-trial detention. A number of significant safeguards under the Constitution and in the statutes are testimonies in this regard. Therefore, the domestic law in many respects is compatible with requirements of international human rights law in relation to pre-trial detention despite shortcomings in the formulation of grounds justifying deprivation of liberty in the CPA.

One major problem lies with the enforcement of the rights guaranteed under the Constitution, as this is the exclusive jurisdiction of the High Court to hear and decide. Conferring such power to the High Court on all matters relating to the basic rights and freedoms while there are no sufficient resources to support legal mobilization impinges on access to the justice by poor persons. In addition there is high level of ignorance of Constitutional rights among the public. The lack of effective complaint procedures and independent monitoring body to supervise the conducts of law enforcers provides opportunity to individuals law enforcement officials to violate human rights with impunity.

The study has shown that there is a wide gap between what the law provides as rights and obligations with the actual police practices. The practices of individual police officers are not regulated by the legal procedures but in most cases by their own personal interests. As a result corruption in the police has become a continuing problem indicated by widespread corrupt practices among individual police officers. This has raised serious concern about integrity of the police. Although the police force has been taking disciplinary measures

against police officers involved in corrupt practices, nevertheless, the problem still exists in an alarming proportion. One of the aspects of fighting corruption in the police is to ensure that those in supervisory and managerial positions take responsibility for tackling corruption in their commands given the fact that it is assumed that corruption cannot exist unless it is at least tolerated by some officers in those positions.

The continuation of violations of right to personal liberty and security in Zanzibar is very much influenced by the fact that the law making body trust the law enforcement agencies as an instrument of the government to control the public. For example, establishment of the Volunteer Brigade with all powers of law enforcement and with immunity against any act or omission in the midst of political culture of hostility and enmity in Zanzibar jeopardizes the fundamental rights and freedoms guaranteed under the Constitution.

Finally, this study has observed that enforcement of the rights of pre-trial detainees is hindered by economic situation of the government and the individuals. The government fails to fulfil its obligations and promises due to economic problems of which some of them are associated with Structural Adjustment Programmes and related economic policies by the International Monetary Fund (IMF) and by the World Bank which have direct impact on the justice system in many developing countries¹⁶⁰. Thus, the government fails to allocate adequate budget, for example, to improve working conditions of the police, for police training and motivations, to improve condition of detention facilities, and to provide free legal services to the poor. On the other hand, many people are poor that they are unable to get assistance of legal counsel soon after their arrest on criminal charges and before the court. Therefore, all problems arising out the whole process of administration of criminal justice system, it is the poor persons who suffer the consequences.

¹⁶⁰ Chris Maina, *Legal Aid and Access to Justice in Zanzibar: Examining Criteria for Provision of Legal Assistance*, in Haroub Othman and Chris Maina Peter (eds.), *Perspective on Legal Aid and Access to Justice in Zanzibar* 2003, p.20 . Also see Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania. CRC/C/15/Add. 156 para 9

6.2 Recommendations.

The following are recommendations based on the findings of this study and therefore are addressed to the government and the police authorities in order to take necessary measures in relation to effective protection of right to personal liberty and security and also rights of pre-trial detainees.

- The government should develop programs that aim at reducing the number of pre-trial detainees in pre-trial detention at the same time take steps to improve the condition of pre-trial detention facilities especially at police stations. There should be regular forums that involve all stakeholders in the administration of criminal justice and NGOs to discuss status of pre-trial detainees and their rights under domestic legal system and how they are implemented in practice.
- The Zanzibar government should establish an independent and effective system of supervision of pre-trial detention especially at police stations. The members of supervisory body should be persons of high moral character and competent in the field of human rights such as lawyers and from human rights defender institutions.
- Recruitment of police officers should be on the basis of qualifications of the applicants and fairly administered in order to get competent persons into the police. Given the nature of the police duties certain qualities may be considered in the screening process such as ability of the applicant to analyse facts and make decision, to reason logically and to communicate and write properly.
- The police and the government should scientifically investigate causes of corruption and develop policies and programs that aim at eliminating the vice in the police at the same time boosting morale of the police, enhance police accountability to the society, improve police welfare, and increase police-community relationship. There should be a system of assessment of anti-corruption policies in order to get feedback for further improvement.

- The government should take steps to ensure there is a long-term plan for democratization of the Tanzania Police Force in order to meet the requirements of democratic policing. This plan may start with transformation of the ‘Tanzania Police Force’ into ‘TANZANIA POLICE SERVICE’ in order to make it more and effective public safety and security oriented than an instrument of the state and for the state.
- The Tanzania Police should build close working relationship with the Ministry of Justice to consider reforming police education to meet requirements of international human rights principles and the rule of law. Also to develop codes of practice for detention that will guide police officers towards the best practice in the treatment of pre-trial detainees.
- The government should consider decriminalisation of certain offences in the CPA, which opens the door for misuse, and also violate right to freedom of movement guaranteed under the Constitution.
- The government should be responsive to individual allegations of abuse of power and violations of human right by its officials. Those responsible should be brought to justice in order to ensure compliance with the law and procedures.
- The government and all stakeholders should take measure that aim at rising public awareness of legal rights and access to justice.
- The government should consider possibility of granting Resident Magistrate’s Court the original jurisdiction concurrent with the High Court with the aim of bringing justice close to the poor persons.

- The police should consider introduction of electronic recording of interrogation to safeguard rights of the pre-trial detainees. This may help the investigating officer to get evidence from the suspect that can be produced before the court without being disputed that the investigating officers acted unfairly against the suspect. However, this depends on procedural criteria whether such evidence can be presented. Nevertheless, recording may be one means to survey the interrogation situation.

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